# Central Law Journal.

ST. LOUIS, MO., AUGUST 28, 1896.

The somewhat anomalous proposition that a woman may recover in her own name damages for her own seduction was asserted recently in an Indiana case, Henneger v. Lomas. The decision was warranted by a statute of that State providing that "any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor." It is interesting to note the two points which were decided in the case. They were first, that a woman after marrying her seducer and then obtaining a divorce, cannot sue him for the seduction; second, that, though a woman marries her seducer, she may, if the marriage has been annulled on her application, sue the seducer. The decision on the first point goes on the ground that the rule of the common law, that marriage extinguished antenuptial rights of action between husband and wife, and that they were not revived by divorce, has not been changed as to torts by the statute law of Indiana. The reason for the holding of the court on the second point arises out of the distinction between a divorce and an annulment of a marriage. An action for divorce is brought for the purpose of dissolving a marriage, while a nullity suit is brought for the purpose of having a void marriage declared void, or a voidable marriage judicially made void. In the divorce suit the marriage is recognized as valid, and adjudged to be dissolved from the date of the decree; but in the nullity suit the marriage is not recognized, but is adjudged void—that is, that there was no marriage—and the rights of the parties are the same as if the marriage had never taken place. The annulment of the marriage in the case noted had been obtained principally on the ground of fraud, and the alleged fraudulent acts relied on were that defendant in marrying plaintiff did not intend to live and cohabit with her, or have any sort of marital intercourse with her, but merely went through the ceremony to avoid prosecution for bastardy and seduction, and immediately left her. The decision was on demurrer, and the court cited, as authority that such circumstances would constitute fraud entitling a wife to have a marriage annulled. Bishop v. Redmond, 83 Ind. 157, and Bishop on Marriage and Divorce, Ed. 1891, sections 473, 476 (note 2), 477, 327-339.

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The dissenting judge of the Supreme Court of Washington—Judge Dunbar—in the case of Solicitors Loan & Trust Co. v. Robins, is not, as he admits, upheld in his conclusion, by the weight of authority, though many will agree with him looking at the question from the standpoint of common sense and strict legal procedure. The court held that the liability of a grantee of mortgaged premises on his assumption of the mortgage debt is enforceable at the instance of the mortgagee. This doctrine is in accordance with the weight of authority, to the effect that the mortgagee is entitled in some form to enforce such an agreement against the grantee on the ground that as between a mortgagor and his grantee in such instances the grantee becomes the principal for the payment of the debt, and as between them, the position of the mortgagor is that of surety, and that in equity a creditor is entitled to the benefit of any obligation or security given by the principal to the surety for the payment of the debt. The leading case to that effect is Keller v. Ashford, 133 U. S. 610. Judge Dunbar, however, contends with much plausibility that such position is illogical and wrong, upon the ground that there is no privity between the mortgagor and the grantee. "They are" says the learned judge "strangers to each other, and under what principle of law or by what legal deduction the mortgagor has a right to claim a judgment against the grantee I am at a loss to understand, even from a perusal of the cases sustaining the doctrine, and from the case decided by the United States Supreme Court cited by the majority. It cannot, it must be conceded, be based on the theory of privity. The clause in the deed providing for the payment by the grantee is purely for the benefit of the mortgagor, if it can be construed for the benefit of any one. It is in reality only a recital in the deed which is unsigned by the grantee; and, if it can be construed to be a promise at all, it is a promise not in writing, and therefore falls within the statute of frauds. But, conceding it to be a binding promise on the grantee so far as the

mortgagor is concerned, how can it be possible that the security which the mortgagee saw fit in his original contract, and in fact the only contract he has made, to take for the payment of his debt, can be increased by the subsequent action of the mortgagee, at least so as to bind a stranger to the original contract? It must be conceded that no action of the mortgagee could lessen or destroy the security of the mortgagor, and it is just as illogical to conclude that the action of the mortgagor by transfer to a third party can increase said security. The court in Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. Rep. 494, admits the general doctrine that in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee, but states that 'it has been held by many State courts of high authority, in accordance with the suggestion of Lord Hardwicke in Parsons v. Freeman, 1 Amb. 116, that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser.' This suggestion, it seems to me, is exactly in conflict with the rule above stated, but the court says: 'This result has been attained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt.' To my mind, there has been no development here at all, but one doctrine is squarely opposed to the other, both in reason and effect. To allow a mortgagee to bring an action against a stranger to the contract, and obtain against him a deficiency judgment, thereby increasing the security which he was entitled to under his contract, is opposed to every well-established principle of law; and I cannot consent to it until it becomes the established rule of law in this State."

## NOTES OF RECENT DECISIONS.

DEED—COVENANT—BUILDING RESTRICTIONS.—The case of Hawes v. Tavor, 43 N. E. Rep. 1076, wherein the Supreme Court of Illinois hold that a covenant that a house shall be set back twenty feet from a certain line is not violated by the extension of an open porch over that line, is in conflict with the rulings of the Supreme Court of Pennsylvania in Ogontz Land & Imp. Co. v. Johnson, 31 Atl. Rep. 1008, and of Massachusetts in Reardon v. Murphy, 40 N. E. Rep. 854. The case of Graham v. Hite, 93 Ky. 474, is in line with the Illinois case.

ACTION—TRANSITORY—CONFLICT OF LAWS.—A cause of action for personal injuries to a railroad employee in Mexico, although transitory, is denied enforcement in Texas in the case of Mexican Nat. R. Co. v. Jackson (Tex.), 31 L. R. A. 276, on the ground that the statutes of the two countries are so materially different that the Texas court cannot attempt to adjudicate the rights of the parties. Among the peculiar Mexican laws governing the case is the right to what is called extraordinary indemnity in a sum which the judge may deem proper, considering the plaintiff's social position, and also the right to additional damages or a reduction from the original recovery by subsequent judgments in case the condition of the party changes.

CREDIT INSURANCE—UNCOLLECTIBLE DEBTS—CONTRACT.—The Circuit Court of Appeals for the second circuit holds, in Tebbets v. Mercantile Credit Guarantee Co., 73 Fed. Rep. 95, that the contract by which a corporation undertakes in consideration of premiums paid, to indemnify the other party to the contract against losses by uncollectible debts, is not a contract of suretyship, but of insurance, in spite of the fact that the corporation calls itself a "guarantee" or "surety" company; and as such is subject to the rule that any ambiguities in the policy drawn up by the insurer, who makes his own conditions, are to be resolved against the draftsman; and accordingly that in a policy by which the company agrees to purchase from the insured an amount of uncollectible debts not exceeding $15,000 in excess of one-half of one per cent. of their total gross sales and deliveries, a provision that "the contract is issued on the basis that the yearly sales and deliveries of the insured are between $1,800,000 and $2,500,000," was not a stipulation that the total sales and deliveries, on which the one-half of one per cent. is to be computed must amount to at least $1,800,-

See also.
Sharman v. Credit Co. {32 L.R.A. 183 / 92 Wis. 366

000, but that the insured might recover from the insurer his losses, not exceeding $15,000, in excess of one-half of one per cent. on his actual total of sales and deliveries during the year.

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SALE—RESCISSION BY SELLER—STOPPAGE IN TRANSITU — INSOLVENCY OF PURCHASER — ELECTION OF REMEDIES.—Two courts have recently decided interesting questions as to the law of sale and rescission thereof on account of the insolvency of the purchaser. The Supreme Court of Iowa holds in Kearney Milling & Elevator Co. v. Union Pac. Ry. Co., 66 N. W. Rep. 1059, that a seller of grain on credit, who learns, while it is in transit, that the buyer is insolvent and intends to get possession with intent to defraud, may rescind the sale (Deemer, J., dissenting); that where a seller of grain, on learning that the buyer is insolvent and intends to get possession with intent to defraud, elects to rescind the sale, and stops the grain in transit, he cannot thereafter claim that by the stoppage he acquired a lien for the price as against one to whom the bills of lading had been transferred by the buyer as collateral (Deemer, J., dissenting); that evidence that a seller of grain on learning of the insolvency of the buyer, ordered the carrier not to deliver it to the consignee, stopped the grain in transit and sold it as his absolute property, with full knowledge of all the material facts, sufficiently shows an election to rescind the sale (Deemer, J., dissenting); and that a seller, on rescinding a sale and stopping the goods in transit, should give notice to the buyer of an intention to resell (Kinne, J., dissenting).

The Supreme Court of Wisconsin decides in Jeffris v. Fitchburg R. Co., 67 N. W. Rep. 424, that evidence that a corporation failed to pay a claim for lumber sold for more than 10 months after it became due, and after demand therefor had been made; that the seller, while endeavoring to collect the claim, found that there was no such corporation located at the place given in the order for the lumber as its place of business, and that its name was not in the city directory, sustains a finding that it was insolvent, so as to justify the seller in stopping the goods in transit; that evidence that lumber was delivered to a carrier for transportation to the consignee, and that the company had piled it in a shed after it had reached its destination, and held it for payment of freight and charges, under a local custom allowing the consignee to take possession on payment of such freight and charges, shows that the lumber was in possion of the company as a carrier, and not as a warehouseman, or as the agent of the consignee; so that a stoppage in transit for insolvency of such consignee was permissible, and that the delivery of part of a consignment of lumber which had been held by the railroad company for freight and other charges will not operate as a delivery of the whole consignment in the absence of a clear showing of an intention to that effect.

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CRIMINAL LAW—SEIZURE OF PAPERS—COMPELLING DEFENDANT TO CRIMINATE HIMSELF.—In a recent issue of this JOURNAL we published an interesting article on the subject of the "Admissibility of Evidence Illegally Obtained." A question of that character recently came before the Supreme Court of Connecticut in State v. Griswold, 34 Atl. Rep. 1046. The prosecution was for arson, and it appeared that defendant had been carrying on a clandestine correspondence, under an assumed name, with a woman, and that the night before the fire he had taken from his office a picture of the woman, and mailed it to himself, under such assumed name. After his arrest, police officers went to his new office, and without warrant, but by consent of his assistant, whom they found in charge, searched for and seized the envelope in which the picture was mailed. It was held that there was not an unreasonable seizure, within the meaning of Const. art. 1, § 8, providing that all people shall be secure in persons, houses, papers, and possessions, from unreasonable searches or seizures, and that admission in evidence of the envelope and its contents thus taken by the police officers was not error, as being in violation of the provision of Const. art. 1, § 9, declaring that no one shall be compelled to give evidence against himself. The court said:

A constitution is that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised, and its provisions are the rule of conduct for those branches of the government which exercise the sovereign power. Both the sections cited by the defendant have reference to the security of the citizen as to his possessions, and as to his person. The eighth section forbids the legisla-

ture to enact any statute, and the courts from passing any rule, which would authorize any unreasonable search or seizure of the goods of a citizen, and the ninth forbids any legislation or rule of court which would compel any one accused of a crime to give evidence against himself. In this respect neither of the sections so cited has any application to this case. The act of the police was not directed, nor is it sought to be justified, by any statute, or by any rule of any court. The theory of the defendant is that that act was a trespass. For the present purposes, that theory may be granted to be the true one. And what then? The police officers would be liable, in a proper action, to pay to the defendant all damage they had done him. But that consequence does not affect the question now before us. It does, however, show that the eighth section of article 1 has no bearing upon the facts of this case. Indeed, the defendant hardly claims that the eighth section alone affects his objection. But he does claim that a search or a seizure may be so made that the production in evidence of any of his goods or possessions taken is to compel the accused to furnish evidence against himself, and in that way to become a violation of the ninth section of the first article of the constitution. This might be the result where the private papers of a suspected person were seized in order to be read to the jury as incriminating evidence against him. To reach this result the word "papers," in the eighth section of article 1, must be taken to mean writings,—not pieces of paper, as mere inanimate goods, but papers on which are written or printed words that may be shown in evidence as the words of the suspected man. In this sense a search or seizure of the "papers" of a citizen might be unreasonable, because it might lead to a violation of the provisions of the ninth section. In Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. Rep. 524, an act of congress was held to be unconstitutional because it required the party to produce his books, invoices, and papers, and because the "entries" in the books, invoices, and papers so produced were to be made evidence against him. See, also, Ord. Const. Leg. 247; 1 Hare, Const. Law, 531. It was against the seizure of "papers," using that word in the sense just mentioned, that the vigor of Lord Camden's opinion in Entinck v. Carrington, 19 How. State Tr. 1029, was directed. The package here shown to the jury was an envelope with certain inclosures,—a simple piece of the defendant's personal property; having of itself no voice or meaning, so far as his guilt or innocence was concerned, any more than if it had been a lump of clay, or a block of senseless wood. It made no statement. It gave no evidence. Its presence or absence on the trial, if it had stood alone, would have signified nothing. It was his conduct in respect to this piece of property, both before and after the fire,—his extreme solicitude to save it from destruction,—which was incriminating. This conduct was detailed to the jury by sundry witnesses, and to their testimony no objection was made. We think no constitutional provision was violated by permitting the jury to see the envelope. And even if it had been taken from the possession of the defendant by a trespass, as he claims, that would have been no valid objection to its admissibility. 1 Greenl. Ev. § 254*a*; Whart. Cr. Ev. § 678; Com. v. Dana, 2 Metc. (Mass.) 329; Legatt v. Tollervey, 14 East, 302; Jordan v. Lewis, *Id.* 305 (*n*); Phil. Ev. p. 426; State v. Jones, 54 Mo. 478; State v. Garrett, 71 N. C. 85; State v. Flynn, 36 N. H. 64, 70; Com. v. Tibbetts, 157 Mass. 519, 521, 32 N. E. Rep. 910; Com. v. Brown, 121 Mass. 69, 81; Com. v. Welch, 163 Mass. 372, 40 N. E. Rep. 103; Com. v. Brelsford, 161 Mass. 61, 36 N. E. Rep. 677; Chastang v. State, 83 Ala. 29, 3 South. Rep. 304; Spicer v. State, 69 Ala. 159; Sampson v. State, 54 Ala. 241; Siebert v. People, 143 Ill. 571, 32 N. E. Rep. 431; Gindrat v. People, 138 Ill. 103, 111, 27 N. E. Rep. 1085; Painter v. People, 147 Ill. 444, 466, 35 N. E. Rep. 64.

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VENDOR AND PURCHASER—IMPLIED LIEN FOR PURCHASE MONEY.—The Supreme Court of Oregon decides, in Frame v. Sliter, 45 Pac. Rep. 290, that a grantor of real estate by absolute deed, followed by delivery of possession to the grantee, has no implied equitable lien for the unpaid purchase money. The court says:

It has been several times mooted in this court, but the doctrine of the English court of chancery, which recognizes and upholds such lien, has never been recognized or established here, although the State is classed by many text writers among those in which the lien prevails. The earliest case in which reference is made to the question, and the one most strongly relied upon to sustain the doctrine, is Pease v. Kelly, 3 Or. 417; but the court in that case only decided that, by taking a mortgage to secure the payment of purchase money, the vendor waived the equitable lien, and therefore could not maintain the suit. Nothing more was in fact decided in that case, although it is stated in the opinion that "the lien exists if there is no higher security." It is next referred to in Kelly v. Ruble, 11 Or. 75, 4 Pac. Rep. 503, where the court, after disposing of the case on other grounds, say: "We have thus far impliedly admitted the existence of the equitable lien of a vendor of real estate for the unpaid purchase price. But we doubt the actual existence of the lien in this State. Ahrend v. Odiorne, 118 Mass. 261; Kauffelt v. Bower, 7 Serg. & R. 64. It is not believed the existence of such a lien was decided in Pease v. Kelly, 3 Or. 417." The question again arose in Gee v. McMillan, 14 Or. 268, 12 Pac. Rep. 417; and Mr. Justice Strahan puts his decision in that case squarely on the doctrine of the existence of a grantor's lien, but Chief Justice Lord dissents *in toto*, and Mr. Justice Thayer, while concurring in the result upon other grounds, expressly disclaimed any intention to decide whether the principles upon which the doctrine is supposed to be founded are broad enough to "uphold a vendor's lien to the extent of raising a trust in favor of a grantor who has conveyed by deed of absolute conveyance, so as to admit of the purchase price being made a charge upon the property conveyed, in an ordinary case of real estate." In Lewis v. Henderson, 22 Or. 548, 30 Pac. Rep. 324; Thomas v. Thomas, 24 Or. 254, 33 Pac. Rep. 565, and Jones v. Gates, 24 Or. 415, 33 Pac. Rep. 668, where the doctrine is again referred to, the court carefully avoided approving it even by inference. From these decisions it is apparent that it has never received judicial sanction, or become a law of real property in this State, and its decision is now made necessary for the first time. We therefore feel at liberty to determine the question as one of first impression, and, after having given it the careful and deliberate consideration which its importance demands, we are clearly of the opinion that the doctrine of a grantor's lien is so opposed to the general policy and course of legislation in this State that it ought not to prevail here. The whole tenor of our legislation is to make the title to real estate as simple and easily

understood as possible, and to facilitate its transfer, by discouraging all secret or latent equities, and requiring all conveyances thereof and incumbrances thereon to be made a matter of public record.

The doctrine seems to have been borrowed by the English courts of chancery from the civil law, as a means of evading the rule of the common law under which land was not liable, both during and after the life of the debtor for simple contract debts, and after the reason for its original adoption had ceased to exist, was enforced upon the ground that the previous decisions had "the effect of contract, though no actual contract had taken place." Mackreth v. Symmons, 15 Ves. 329. Many of the courts of this country, following the English cases, have adopted the rule; but they have never been able, in our opinion, to place the doctrine upon any satisfactory principle applicable to the condition of affairs in a country where real estate is one of the principal articles of commerce, and liable for the debts of the owner, and in which a system of registration prevails. The doctrine has been variously stated to rest upon natural equity, a supposed intention of the parties, a trust arising out of the vendee's holding the land without paying the price, the implied agreement of the parties, and an equitable mortgage. But, manifestly, it cannot be supported as an equitable mortgage, because there is no pretense in such cases that there was any agreement for security on the land, which isessential to an equitable mortgage; nor can it be supported as a trust, for a constructive trust cannot arise from the mere breach of a contract to pay money in the absence of fraud; nor on the ground of an implied agreement, because, as said by Mr. Justice Gibson, in 7 Serg. & R. 76, "the implication that there is an intention to reserve a lien for the purchase money, in all cases where the parties do not, by express acts, evince a contrary intention, is, in almost every case, inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass." Nor do we think it can now be put upon the natural equity "that a person having got the estate of another shall not, as between them, keep it, and not pay the consideration," because there is no reason for a resort to equity in this country, where real estate is liable to seizure upon attachment and execution, and the courts of law afford a creditor a speedy remedy for the enforcement of his claim. And, besides, "it is inconsistent with natural justice," quoting again from Mr. Justice Gibson, in the case referred to, "that a vendor who publishes to the world, by the terms of his deed, that he has parted with his whole interest, and has trusted to the personal security of the vendee, should become the object of special protection against the consequences of his own negligence, and that, too, at the expense of a third person, who, in purchasing from the vendee, even with notice that the purchase money was unpaid, has been guilty of nothing positively immoral or even unconscionable." If a vendor sells and conveys real estate, and, either through negligence or overconfidence, choses to rely upon the personal security of his vendee for the purchase money, he has no special claim to the aid of a court of equity to protect him from the consequences of his own act, by enforcing some secret lien which, in the nature of things, could be known only to himself and his vendee and such persons as they might take into their confidence, a practice which, if tolerated, would have a tendency to open wide the door of fraud and perjury.

The earliest English case which contains a full discussion of the doctrine, and the reason and authorities by which it is supported, is Mackreth v. Symmons, *supra*. In that case, Lord Eldon was only able to determine that two points were clearly settled: (1) That, generally speaking, there is such a lien; and (2) that, in those general cases in which there would be a lien as between vendor and vendee, the vendor will have a lien against a third person with notice that the money was not paid. But, as to what would be sufficient to make a case in which the lien would not exist, he felt obliged to declare, from the authorities, that it was "obvious that the vendor taking a security, unless, by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands without the judgment of a court how far that security does contain the evidence, manifest intention or declaration plain upon that point;" and that "it has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution, or to have laid down the rule the other way so distinctly that the purchaser might be able to know, without the judgment of a court, in what cases it would, and in what cases it would not, exist." And, although the doctrine of the English court of chancery has been the subject of much learned discussion in this country, it is no more satisfactory now than it was in Lord Eldon's time. Indeed, it is much less so. From the very nature of the lien itself, there can be no fixed rules concerning it. It is "a mere creature of a court of equity, which it molds and fashions according to its own purposes," and "has no existence until it is established by the decree of a court in the particular case, and is then made subservient to all other equities between the parties." Story, J., in Gilman v. Brown, 1 Mason, 191, Fed. Cas. No. 5,441. And Mr. Justice Potter says: "Its existence depends upon and is controlled by no settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established, and, if so, whether it is not made to yield to higher or superior equities in some other person—whether the party is not to be regarded as having waived it, or as having intended to waive or postpone it to another equity, or whether by the acts or omissions to act, or by the neglect of the party claiming such lien to enforce it within a reasonable time, the right is not lost, as being the superior claim. These considerations control and vary the result as equity demands." Fisk v. Potter, *41 N. Y. 64.

Under the authorities, it would seem that, where the doctrine prevails, each case must be determined upon its own peculiar circumstances, according to the views of the chancellor and the weight of the argument at the bar; so that it is impossible to tell, without the judgment of a court, whether the lien does or does not exist. It may be well doubted whether any subject connected with the American law of real property has provoked more judicial discussion and controversy, and is now in a more chaotic state, than the doctrine of a grantor's lien where such lien is held to exist. There is hardly a rule upon the subject which has not been somewhere denied, and hardly any two States agree upon the essential points of the doctrine. "No other single topic belonging to the equity jurisprudence," says Mr. Pomeroy, "has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its opera-

tion, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different States, and sometimes even in the same State, are directly conflicting. It is practically impossible to formulate any general rules representing the doctrine as established throughout the whole country." 3 Pom. Eq. Jur. § 1251. Indeed, the remark attributed to Lord Mansfield, that, "the more we read, the more we shall be confounded," is peculiarly applicable to the condition of the law upon this question. It has been adjudged that the lien does not exist under any circumstances after an absolute conveyance, by such able jurists as Mr. Justice Gray, of Massachusetts (now of the Supreme Court of the United States), Gibson, of Pennsylvania, Nash and Ruffin, of North Carolina, Crozier, of Kansas, Shipley, of Maine and Maxwell, of Nebraska, to whose opinions in Kauffelt v. Bower, 7 Serg. & R. 64; Ahrend v. Odiorne, 118 Mass. 261; Womble v. Battle, 3 Ired. Eq. 183; Simpson v. Mundee, 3 Kan. 172; Philbrook v. Delano, 29 Me. 410; Edminster v. Higgins, 6 Neb. 265—we refer for arguments which seem to us conclusive against the existence of such a lien. In some of the States it has been adopted by the courts, and afterwards abolished by the legislature; and in others, although the courts have felt bound to follow earlier cases, it has of late years been done with expressions of regret that such liens were ever admitted in this country, where registration is so generally provided for and practiced.

In courts of the United States the doctrine has been recognized where established by the local laws of different States (Rice v. Rice, 36 Fed. Rep. 858); but it does not seem to have been looked upon with favor, if we may judge from the remarks of Mr. Chief Justice Marshall, in Bayley v. Greenleaf, 7 Wheat. 51, that "it is a secret invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world the vendee appears to hold the estate divested of any trust whatever; and credit is given to him, in the confidence that the property is his own, in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice to the world. If he does not, he is, in some degree, accessory to a fraud committed on the public, by an act which exhibits the vendee as a complete owner of an estate on which he claims a secret lien." The authorities *pro* and *con* are collated in 28 Am. & Eng. Enc. Law, 163; 3 Pom. Eq. Jur. § 1251; 2 Jones, Liens, § 1061; 1 Beach, Mod. Eq. Jur. §§ 296, 297; and note to Mackreth v. Symmons, 1 Smith, Lead. Cas. Eq. 447. And we think an examination of them and the discussion of the question by the several authors will clearly show that the whole doctrine is inconsistent with the general policy prevailing in this country of making all matters of title dependent upon record evidence, so that interested parties may know whether the land is incumbered by lien without waiting for the judgment of a court, as is admittedly the case in many instances where a grantor's lien exists; that it bristles with difficulties, snares and dangers, and ought not to find lodgment in this State, where its only effect would be to render the title to real estate uncertain, embarrass its alienation, foster litigation, and offer temptation to fraud and perjury, with no substantial benefit to any one except to protect some grantor from the consequences of his own voluntary act. The decided tendency of modern legislation and legal learning is clearly against the existence of such a lien under any circumstances.

## THE RIGHT OF A PARTY TO IMPEACH HIS OWN WITNESS.

Probably no rule of evidence is more familiar and yet hardly none causes more confusion than the one it is the purpose of this paper to discuss, viz.: "A party cannot impeach his own witness." This confusion is probably due in part to the fact that the word "impeach," in this connection, has a double meaning. It may refer, first, to the testimony of a witness as to whether it can be attacked or discredited, or, second, to the witness himself, as to whether he is reliable or worthy of belief. The doctrine of the common law is, that a party calling a witness recommends him as worthy of credit, and is therefore not permitted to impeach, cross-examine, or discredit him in any way. Furthermore, the law presumes that a witness is favorable to the party calling him, and leading questions cannot be put to him on the direct examination. This statement of the rules of evidence applicable to the question under discussion is, however, true only in a general way. In practice some exceptions have at different times been made or at least the rules have not been rigidly adhered to. A great deal of confusion has likewise been the result of the application of the rules in different cases. Courts have been at a loss to know just how much relaxation should be allowed, and the question as to how far a party may go in impeaching or discrediting his own witness has been a fruitful source of dissenting opinions. The confusion thus resulting from the application of such important principles to the introduction of evidence in the trial of cases led England, in 1853, to enact a statute upon the subject,[1] and at least five States of this Union, namely, Massachusetts,[2] Indiana,[3] Georgia,[4] Kentucky,[5] and Texas,[6] have seen fit to follow her example. I find in working up the authorities that text-writers on the subject are somewhat at variance with each other, and all of them, even the later writers, seem to make statements which are inaccurate and unwarranted according to their own citations. It will be

[1] Eng. Com. Law Procedure, Act of 1853 (17 and 18 Vic.).
[2] Mass. Statutes, 1869, ch. 425.
[3] Statutes of Indiana, 507, R. S. 1881.
[4] Georgia Code, 3869.
[5] Ky. Code, 596.
[6] Code of Crim. Procedure, art. 755.

my purpose to take up the different questions which have arisen in the application of this important principle of evidence, and state what I consider to be by the weight of authority the proper rule. In the first place, it is a well settled principle, notwithstanding the general rule, that a party is not bound by the testimony of his own witness, and is not precluded from proving any fact, relevant to the question at issue, by any other competent testimony, even though that testimony is directly contradictory to the testimony of a former witness of the same party;[7] and this is true, not only where the witness is innocently mistaken, but even where it may have the effect collaterally of impeaching his credibility. In a Georgia case,[8] Lumpkin, J., said: "A party is not to be sacrificed and he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. He ought, therefore, be permitted to relieve himself from the effect of testimony which has taken him by surprise, not by showing that a witness from his general character is not entitled to credit, but by showing that the facts are different." The authorities go further and hold that where a witness is hostile, unwilling to give testimony, or is apparently in the interest of the party adverse to the party calling him, the court may allow the direct examination to assume the form and character of a cross-examination, and leading questions may be put to him[9], and he may even be asked whether he has not at a former time made statements inconsistent with his testimony on the trial.[10] Cassoday, J., said in this connection in a Wisconsin case:[11] "The time and circumstances under which leading questions may be put to a witness (meaning an unwilling witness) is a matter necessarily resting in the discretion of the trial court, and judgment will not be reversed on that ground." Elliott, J., who, according to Rice, has best stated the American rule on the subject, says, in a leading case:[12] "Where a party is really taken by surprise, it is in the discretion and even the duty of the court to allow him to put leading questions to his own witness, and in extreme cases, where it is apparent that a witness is giving testimony contrary to the reasonable expectations of the party calling him, such party should be allowed to cross-examine such witness, for the purpose of refreshing his recollection with a view of modifying his testimony and of revealing his real *animus* in the case. But in the exercise of this, sound discretion should be used, lest the privilege be abused."

A more difficult question arises when we consider whether or not it is competent for a party producing a witness whose testimony is unfavorable to show by other proof that he testified differently on a former occasion. I apprehend that it is upon this point that most of the confusion of text-writers in regard to this rule of evidence arises, and this for two reasons,—first, because they fail to recognize the fact that several States, as I have before mentioned, have special statutes on the subject, and second, because they do not always distinguish an ordinary witness from one whom the party is in reality bound to call, such as subscribing witnesses to wills, deeds, and other instruments. In the last edition of Greenleaf[13] the following statement is made: "But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial or to what the party had reason to believe he would testify." It may be well to say that this statement is criticised by Mr. Redfield in his edition of Greenleaf,[14] but is left unquestioned in the last edition of that work. Bradner, in his work on Evidence,[15] published in 1895, and which is the latest work on the subject which I have been able to procure, says: "Although a party calling a witness should not be allowed to impeach his general character, yet he may show that he has told a different story at another time." These statements standing as they do unqualified are I believe, sanctioned, in the absence of statute, by

[7] Lawrence v. Barker, 5 Wendall, 301; Winslow v. Mosely, 2 Stewart, 137; Spencer v. White, I Iredell, 236; Brown v. Osgood, 25 Me. 505; 1 Greenleaf on Ev. Sec. 443; Hunter v. Wetsell, 46 N. Y. 481; Chester v. Wilhelm, 111 N. C. 314; Cross v. Cross, 108 N. Y. 628; Richards v. State, 82 Wis. 172; Richards v. Bryant, 92 Mich. 430; Edwards v. Craushaw, 30 Mo. App. 510.

[8] Burkhalter v. Edwards, 16 Ga. 593.

[9] Hurley v. State, 4 L. R. A. 320; People v. Mather, 4 Wendall, 247; Melhuish v. Collier, 15 Ad. & El. (N. S.) 878.

[10] Hemmingway v. Garth, 51 Ala. 530.

[11] Baker v. State, 69 Wis. 40.

[12] Babcock v. People, 13 Col. 515.

[13] Fifteenth Ed. Sec. 444.

[14] Redfield's Ed. of Greenleaf on Ev., Sec. 444.

[15] Bradner's Ev., p. 19.

very few courts in either the United States or England, and are certainly not in accordance with the weight of authority. I have in the course of my research found two cases which appear to support these writers in their statements. One is a North Carolina case,[16] which holds that the State may discredit its own witness by proving that the witness on a former occasion had given a different account of the transaction. The report in that case cites the court as saying: "The rule is so in civil cases. Let authorities be produced to show how it is in criminal ones." (The gentlemen on both sides searched for authorities but could find none). "I think the solicitor should be allowed to discredit the witness if she has varied from the relation she now gives." Witnesses were allowed. The other case I referred to is a late Kansas case,[17] and holds that a hostile witness may be examined as to whether he had not previously made contradictory statements; and they may in the discretion of the court be permitted to show what such contrary statements were. With these notable exceptions, the courts of the United States appear to be unanimous in holding, in the absence of statute, that a party calling a witness of his own accord cannot impeach his testimony by proving that he made prior contradictory statements.[18] The question in England is now settled by statute, but undoubtedly the weight of authority in that country prior to the statute of 1853 was that a party could not prove prior contradictory statements of his own witness.[19] Many cases are given in the books as upholding the doctrine as laid down by Greenleaf and Bradner, but the cases are either not in point at all or are the reports of the decisions of courts which are governed by statute. The rule as to the right of a party to prove prior contradictory statements of his witness is, however, modified, in the case of subscribing witnesses to wills and other instruments. The relation of the witness to the party calling him is here entirely different, and the reason generally assigned for prohibiting a party from impeaching his own witness, viz: because he vouches for his credibility, fails in the case of a subscribing witness, for no matter how much one may doubt the credibility of such a witness, it is always very convenient, and in most cases absolutely necessary, that such witness be produced. So in the case of subscribing witnesses, or those whom the law compels a party to call, it is laid down and sanctioned by the best of authorities, that statements of such witnesses prior to their statements on the trial may be proven.[20] But I do not think that the courts go any further than to hold that you can impeach the credit of such witnesses by proving prior contradictory statements. Impeachment of their character for truth and veracity is not admissible.

The question as to the right of a party to impeach his own witness by proving prior contradictory statements long occupied the attention of the English courts, and opposite views were maintained. Lord Denman held in favor of the proposition, while Buller J., opposed it,[21] as did Erskine, J., and others. While the weight of authority was probably against Lord Denman, it was not fully settled until the passage of the English statute on the subject.[22] This statute provides that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statements sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statements." The statute of Massachusetts[23] very closely resembles the statute of England in its construction, but in Massa-

[16] State v. Norris, 1 Hayward (N. C.), 430.

[17] State v. Sorter, 52 Kan. 531.

[18] Detheridge v. Gilwath, 16 S. C. 100; Bausket v. Keitt, 22 S. C. 199; Bank of Ky. v. Sheir, 4 Rich. 240; Ever v. Ambrose, 3 B. & C. 746; Richards v. State, 82 Wis. 172.

[19] Stearns v. Merchants' Bank, 53 Pa. St. 490.

[20] Shorey v. Hussay, 32 Me. 579; Whitaker v. Salisbury, 15 Pick. 234; Dennett v. Dow, 17 Me. 19; Cowden v. Reynolds, 12 Serg. & Raw. 281; Thornton v. Thornton, 59 Vt. 122; Garrison v. Garrison, 15 N. J. Eq. 266; Hardon v. Hayes, 9 Pa. St. 151; Olinde v. Saizan, 10 La. Ann. 133.

[21] Ever v. Ambrose, 3 B. & C. 749; Wright v. Bickel, 1 Mood. & R. 414; Holdworth v. Mayor Dartsmouth, 2 Mood. & R. 153; Winnier v. Breth, 2 Mood. & R. 257.

[22] Eng. Com. Law Procedure Act of 1853 (17 & 18 Vic.).

[23] Mass. Statute 1869, ch. 425.

chusetts the power of a party to impeach his witness rests entirely with himself and is uncontrolled by the trial court, while in England the whole matter rests in the discretion of the judge to allow it or not. For this reason it has been held in Massachusetts that their statute must be strictly construed.[24] The statutes of England and Massachusetts seem to draw no distinction between an ordinary witness and one whom the law compels a party to call. Some of the State statutes are, however, different in this respect. The statute of Indiana[25] provides that "a party producing a witness will not be allowed to impeach his bad character unless it was indispensable that the party should produce him or in case of manifest surprise, when the party shall have that right; but he may in all cases contradict him by other evidence and by showing that he has made statements different from his present testimony." An indispensable witness within this statute is one whom a party is compelled to produce to satisfy the requirements of the law.[26] The statute of Kentucky[27] is very similar to that of Indiana. So it would seem that in at least two States you can impeach a subscribing witness by evidence of bad character. Under the statute of Massachusetts it is not necessary that a party be surprised at the testimony of his witness, in order to impeach his credibility by showing that he has made at other times statements inconsistent with his testimony.[28] In Georgia it has been held otherwise under its statute, and contradictory statements of a party's witness cannot be shown unless the witness has deceived or entrapped the party calling him.[29] Thus it is that the old rule of the common law has in the course of time been greatly relaxed either by the drift of judicial decision or by the more effective instrumentality of statutes. The change, upon the whole, has probably been beneficial. It is true that rules of evidence are the result of an extended experience in determining truth and should not be changed for any light or frivolous cause. They should be so constructed as to favor the finding of truth in general, even though they may seem to fail in some particular. Yet even rules of evidence should not be unchangeable. With the advance in our progress, changes in our laws and ever-changing conditions, the rules for determining truth must likewise change. The exclusion of interested parties from the witness stand may have been at one time a mark of wisdom on the part of those who compelled it; to-day it would be considered the greatest folly. Whether or not a strict adherence to the rule prohibiting a party from impeaching his own witness was ever just, in the light of present conditions it would appear safe to say that the States, which by statute have allowed such impeachment to a limited extent, have taken a wise and conservative step in the search after truth. JOHN F. DOHERTY.

[24] Ryerson v. Abington, 102 Mass. 526.
[25] R. S. of Ind. 507 (1881).
[26] Defender v. Scott, 32 N. E. Rep. 87.
[27] Ky. Code, 596.
[28] Brooks v. Weeks, 121 Mass. 433
[29] Dixon v. State, 86 Ga. 754.

## EXPERT WITNESS—FEES—CONTRACT.

### BARRUS v. PHANEUF.

*Supreme Judicial Court of Massachusetts, May 21, 1896.*

1. An agreement by one to go into court at a future day and testify as an expert in regard to a matter which he had examined as a civil engineer, is sufficient consideration for a promise to pay a reasonable compensation in addition to the statutory fees.

2. Where an agreement is made by one to go into court at a future day and testify as an expert as to a matter which he had examined as a civil engineer, he is entitled to recover the reasonable compensation (in addition to the statutory fees) promised him therefor, though he is afterwards summoned and pays the regular statutory fees, and does not then claim extra compensation, or give notice that he will make such claim, and, though testifying, and advising counsel as to questions to be asked him and other witnesses, he is not asked any question as an expert.

ALLEN, J.: The jury must have found, upon the evidence, that the defendant engaged the plaintiff to go into court at a future day and testify for him as an expert in regard to a matter which the plaintiff had examined as a civil engineer. From the dates given it would seem that this engagement was six weeks before the trial. The plaintiff agreed to do this, and talked over the matter, and went into court and testified, and during the progress of the trial advised the defendant's attorney in regard to the questions to be asked of himself and of the other witnesses. At some time after he had so agreed to appear and testify the plaintiff was regularly summoned by the defendant as a witness, and was paid the statutory fees, and made no objection thereto, and made no claim for extra compensation, and it would seem that, during his testimony, he was

not, in fact, asked any questions which called for his opinions as an expert.

The defendant contends that, if there was an express promise to pay the plaintiff extra compensation, such promise was without consideration, and that the plaintiff did no more than he was legally required to do under his subpœna. In this commonwealth, every justice of the peace may issue summonses for witnesses in civil cases. St. 1885, ch. 141. This is usually done by the party's attorney, if he is a justice of the peace, or by a justice upon the mere request of a party or of his attorney, without any consideration of the materiality of the evidence or of other circumstances. No doubt, here, as in England, the court might interpose to prevent this privilege from being used oppressively. Raymond v. Tapson, 22 Ch. Div. 430. But usually no question arises unless a witness fails to attend, in which case the court may issue a warrant to bring him in. Pub. St. ch. 169, § 6. The issuing of this warrant is a matter of discretion, and before issuing it the court usually must be satisfied that the testimony is material, and that the failure to attend is without reasonable excuse. We should be slow to admit that the court would be without power to require the attendance of a professional or skilled witness, upon a summons duly served, and with payment of the statutory fees, although he was unacquainted with the facts, and could testify only to opinions; but such power would hardly be exercised unless, in the opinion of the court, it was necessary for the purposes of justice. *Ex parte* Roelker, 1 Spr. 276, Fed. Cas. No. 11,995; Webb v. Page, 1 Car. & K. 23; Parkinson v. Atkinson, 31 Law J. C. P. 199; Whart. Ev. §§ 380-383. Even in such case the court would probably be without the power to compel the witness to make a study of the case beforehand, or to pay attention to the body of evidence introduced by the parties with a view to forming an opinion thereon. It would seem that one who is summoned as an expert would perform all that the court could require of him if he should hold himself in readiness to be called upon to testify to such opinions as he might have when his turn should come. People v. Montgomery, 13 Abb. Prac. (N. S.) 207; Flinn v. Prairie Co., 60 Ark. 204, 29 S. W. Rep. 459. If a party is content to rest upon his legal rights, and to summon the expert whose testimony he wishes to have, and to pay the statutory fees, without any previous engagement or understanding with him, and to take his chance of being able to get an attachment to bring the witness into court in case he should fail to appear, and if he thus succeeds in getting the testimony which he wishes, and afterwards refuses to pay any special compensation, the question might be directly presented whether the witness would be entitled to recover anything on a *quantum meruit*. That question does not arise here. The questions here are whether there was any sufficient consideration for an express or implied promise to pay, and whether there was sufficient evidence of an engagement by him to testify, as an expert, upon request, which might imply a promise by the defendant to pay him as an expert.

Several cases have arisen, in different courts, where a professional witness has taken the stand without objection, and afterwards has declined to give professional opinions without special compensation, and has been required by the court to answer. Such decisions do not strictly apply to the case before us, because in all such cases the court has judicially determined that the purposes of justice require the testimony of the witness. *Ex parte* Dement, 53 Ala. 389; Wright v. People, 112 Ill. 540; State v. Teipner, 36 Minn. 535, 32 N. W. Rep. 678. In Indiana, however, the court has refused to require such a witness to answer under such circumstances. Buchman v. State, 59 Ind. 1; Dills v. State, *Id.* 15. In Connecticut, in respect to an ordinary witness, not an expert, the court held that, ordinarily, an agreement to pay extra fees will not be sustained, but that it might be valid where the witness assumed a duty which the law would not impose on him, and the court added: "If a witness agrees with a party that he will attend and testify without being summoned, and he is not summoned, and so is not brought under the order or censure of the court, we suppose any reasonable promise for compensation is good, and may be enforced, for the proceeding or service is not in pursuance of the statute." Dodge v. Stiles, 26 Conn. 463, 466, 467. A casual intimation that, ordinarily, a witness can recover only the fees allowed by law, is also found in Pool v. City of Boston, 5 Cush. 219, 221. In the present case, we are of opinion that, upon the facts in evidence, there was sufficient consideration to support a promise to pay a reasonable compensation, in addition to the statutory fees, and that the jury was warranted in finding a promise to that effect, or a mutual understanding that the plaintiff was to be so paid. If such promise was made, or such understanding existed, the plaintiff's right to recover would not be taken away or lost by his omission to claim or demand extra compensation, or to notify the defendant that he should make such claim, or by his acceptance of the statutory fee without objection, or by the omission of the defendant at the trial to put any question to him as an expert witness, and the consequent omission of the plaintiff to testify as an expert. All these were merely matters for the consideration of the jury in determining whether any such promise was made, or such understanding existed. Exceptions overruled.

NOTE.—*Expert Witness Fees.*—By statute in England (5 Eliz. ch. 9), it is provided that a witness in a case is entitled to a reasonable compensation for attending upon court as such in obedience to a subpœna. And in that country the common law courts have adopted a graduated scale "suitable to the sacrifices of time made by witnesses in obeying the summons. Wharton Ev., Sec. 380. Accordingly a witness who is sent for in a foreign country and who, in good

faith, attends upon court and testifies in a cause, is entitled to all the legitimately necessary expenses of the whole journey, both going and returning, as well as a proper allowance while remaining to testify. Tremain v. Barrett, 6 Taunt. 88. Nor is it necessary in order to sustain such allowance that the foreign witness be in reach of a subpœna from the court in which he is to testify. Lonegran v. The Royal Exchange, 7 Bing. 725. Indeed such a rule is manifestly necessary under the statutes of England on the subject, because no witness is bound to honor a subpœna served upon him beyond the jurisdiction of the country whose laws lend validity to the instrument. But if he is disposed to waive this privilege of immunity from the process of the foreign courts, good sense and natural justice alike require that he receive his legitimate compensation. But whatever be the reasonable costs and charges under the English practice, the compensation of witnesses in this country is usually regulated by statute without reference to the vocation or profession to which the witness belongs. 1 Greenl. Ev. Sec. 310. Nor can a witness in this country claim compensation for travel without the State whose laws authorize the issuing of the subpœna. Howland v. Lenox, 4 Johns. 311; Melvin v. Whiting, 13 Pick. (Mass.) 190; White v. Judd, 1 Met. (Mass.) 293. Whatever may be the result of some scattering cases holding a contrary rule, the trend of decisions in this country under the statutes which provide for a certain *per diem* and, in some instances, mileage, going and returning, without reference to the vocation of the witness, is that an expert, like every other citizen, must do his part of duty to the State and her citizens for the common good, and that while he may not be compelled to do any service, such, for instance, as the making of an examination of a dead body to ascertain if death had been brought about by poison, or to examine a wound the character of which would require some special study or preparation in order to testify intelligently concerning same, or, in case of a lawyer, where he would be compelled to take time and make a study before he could correctly answer questions propounded to him, or in cases of any other branch of learning where such preparation would have to be made, yet where this is not necessary to enable the witness to answer any proper questions put to him, though the answer to the question would be the result of his learning and past experience in his calling, and regarded by him as worth an extra sum in addition to the statutory allowance, it is but just to the court and litigants as well, and the latter more especially, that the witness make answer to all questions coming within the range of a legitimate and intelligent examination. *Ex parte* Dement, 53 Ala. 389; State v. Tiepner, 36 Minn. 535; Northampton Co. v. Innes, 26 Pa. St. 156; Flinn v. Prairie Co., 60 Ark. 204, 29 S. W. Rep. 459; St. Francis Co. v. Cummings, 55 Ark. 421, 18 S. W. Rep. 461; Israel v. State, 8 Ind. 467. But an expert witness cannot be compelled to attend the trial and hear all the evidence in order to be able to testify the more intelligently as such expert. This would be requiring a species of preparation which the law does not exact. Flinn v. Prairie Co., 60 Ark. 204, 29 S. W. Rep. 459. But as said by the court in this case: "It is the duty of every citizen to assist, within reasonable limits, in enforcing the criminal laws of the State; and it is not unreasonable that he should be required, on behalf of the State, to give such information as he may possess toward the elucidation of any question arising in a criminal trial, whether that information be in the nature of expert evidence or not. All persons who, by study or practice in an occupation or profession, have become skilled therein, and possessed of knowledge peculiar to the same, are, in law, called experts. There is not an art, trade, profession, or vocation that does not have them. It is evident, therefore, that if all such witnesses are entitled to extra compensation when they testify as experts, the cost of the criminal trials, in cases where such testimony is needed, would be much increased." This decision is under a statute which allows a certain amount for all witnesses who testify without regard to calling or vocation, as is the case in most, or perhaps all, or nearly all of the States. In the case of Webb v. Page, 1 C. & F. 23, the court of common pleas, say: "There is a distinction between the case of a man who saw a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge. Without such testimony the course of justice must be stopped. There is no such necessity as to the latter for his evidence, and the party who selects him must pay him." There is some force in this reasoning, and were it not for the fact that the due and orderly administration of justice is paramount to the convenience of any one citizen, and the implied duty the law enjoins upon every good citizen to attend the courts and testify when necessary and proper, to the end that ample justice may be done the humblest citizen, it might be conclusive. A case may as easily hinge on expert as any other testimony. Ordinarily, it could not be more to the detriment of an expert witness to attend court to testify as to a fact which he may know from ocular observation than one of which he can testify of by reason of his professional training or skill in any branches of the arts and sciences. In most any case the expert can make more money at his calling than attending court as a witness to testify to the most common-place fact; but this argument may not be had to preclude a party fairly entitled to have the testimony of such a witness as it might in many cases result in a practical denial of justice. This reasoning seems to have impressed the court of King's Bench in the case of Calino v. Godfrey, 1 B. & Ad. 950, where it was held squarely that an attorney who had been subpœnæd as a witness and testified in a case in obedience thereto could not claim compensation for the value of his time while so attending, and that such compensation was not within the statute of Elizabeth entitling a witness to reasonable compensation for attending court. The court in this case even went so far as to lay down the proposition that as the attorney was bound to attend and testify for the compensation provided by law, a contract by the party calling him to pay an additional amount to compensate for loss of time was without consideration, and could not be enforced. The Indiana court in one case has held that an expert may not be compelled to testify as such without extra compensation. But the learned court rests its conclusions partly upon the fact that the constitution of Indiana provided that "no man's services shall be demanded without just compensation." Buchman v. State, 59 Ind. 1. The rule even in this State would probably have been laid down otherwise but for this provision of the constitution, which the court seems to have felt impelled to thus regard. Besides, with this constitutional provision, two of the judges dissented, thus weakening the case as an authority. In the Case of Roelker, 2

Spr. 276, an interpreter was required to testify without being allowed extra compensation. The court was of the opinion that the evidence was such as might be called expert but as no special inconvenience appeared the witness was required to give his evidence without the extra compensation demanded. It was intimated, however, that in the case of abuse of the privilege of having witnesses by requiring an expert to attend from a remote part of the State to give his professional opinion on a question, it might be unreasonable if the same testimony could be had of others more conveniently situated. But the fears of the court in this respect are probably unfounded as a rather extraordinary case is supposed. It could rarely be necessary to send two or three hundred miles, for instance, to get the evidence of an attorney, physician, or other expert witness, as the suitor could not, as a rule, compel the attendance without payment or tender of the necessary mileage, both going and returning, as well as fees for attendance at least one day, as is usually provided by statute. The litigant would not be swift to thus burden himself with such expensive witnesses when others, just as competent to testify, could be had with much more ease and more speedily, near at hand. Of course in a case where a litigant has attempted to have the testimony of an expert on a matter fraudulently to avoid obtaining the same information in the usual way by paying therefor, no court would require such expert to testify, and if he should do so under such circumstances, the litigant not demanding his evidence in good faith in the case, an action would doubtless lie against the suitor for the value of the opinion thus obtained. In the case of Wright v. People, 112 Ill. 540, the appellant was a practicing physician and graduate of a reputable medical college. He had been called professionally to see a man suffering from "dizziness and buzzing in his head and ears, and was laboring under the hallucination certain parties were in pursuit of him and were seeking to harm him." After having testified accordingly without objection, the witness was shown a common policeman's "billy" and was asked if a blow with this instrument would probably produce such a condition as that described. The witness refused to answer the question unless paid ten dollars as a special fee for his expert testimony in this respect. He was fined for contempt and it was held on appeal that, as he had voluntarily testified as to the condition of the patient, he would have to answer the hypothetical question, and that he had been properly adjudged in contempt of court. But what would have been the ruling of the learned court but for the fact of the witness having volunteered to testify so far, is left to conjecture. Certainly, however, upon principle, the extra compensation could not lawfully have been demanded in this case. The physician was put to no extra trouble; he knew all about what he was required to testify of; was required to tell nothing he could not tell by reason of information he had already received by attending the case, and what he was supposed to know generally as a practicing physician; was required to make no examination, nor put himself to any expense or loss of time to investigate the matters inquired of him. He could not demand pay as a witness for the value of his services to his patient, surely, and the only question at all in his case was the right of the court to require him to answer a simple hypothetical question that could be answered with as much ease and as little loss of time or expense as could the simplest question of fact concerning common-place matters. The Texas court of criminal appeals lays down the law as thus contended for in the following vigorous style: "The court may compel a physician to testify as to the result of a *post-mortem* examination; and it is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty, should refuse to testify in a cause pending before the courts of his country, involving the life or liberty of a fellow being and the rightful administration of the laws of a common country." Sumners v. State, 5 Tex. App. 374, 377. "The professional witness," say the Colorado court of appeals, "in the discharge of his duty as a good citizen, is like any other person, whether he be laborer, merchant, broker, manufacturer, or banker, compellable to attend in obedience to process, and to testify as to what he may know, whether it be observed fact, or accumulated knowledge, acquired by study and experience." Co. Commissioners v. Lee, 3 Colo. App. 177. In this extract the whole law of the subject finds admirable expression.

Nashville, Ark. W. C. RODGERS.

## JETSAM AND FLOTSAM.

### NEGLIGENCE IN THE MAINTAINANCE OF ELECTRIC WIRES.

The degree of care required of those who maintain electric wires in highways is said, in Denver Consol. Elec. Co. v. Simpson (Colo.), 31 L. R. A. 566, to be properly described as the utmost degree of care and diligence—that is, the highest degree of care, skill and diligence, so as to make the wires safe against accidents so far as such safety can be secured by the use of such care and diligence; although the court thinks it preferable to describe it as the reasonable care and caution which should be exercised by a reasonably cautious and prudent person under the same circumstances.

That the care must be commensurate with the great danger that exists, although the owners of such wires are not insurers against accidents, is the decision in City Electric Street R. Co. v. Conery (Ark.), 31 L. R. A. 570, while in Western Union Teleg. Co. v. State, Nelson (Md.), 31 L. R. 572, it is said that the privilege of carrying a deadly current of electricity on electric wires, although they are insulated, imposes the duty to so manage affairs as not to injure persons lawfully on the streets, and make the streets substantially as safe for them as they were before. With these cases is a note analyzing all the authorities on the liability for injuries by electric wires in highways.

Failure of an electric light company to take proper steps to receive information concerning the condition of its wires after a storm is held, in Mitchell v. Charleston, L. & P. Co. (S. C.), 31 L. R. A. 577, to constitute actionable negligence, as much as the failure to repair them within a reasonable time after notice would do.

The coiling of a trolley wire over a span wire at the temporary termination of the line, thereby charging the span wire with electricity, is held, in Huber v. La Crosse City R. Co. (Wis.), 31 L. R. A. 583, to be insufficient to make the trolley company liable to an employee of an electric light company, who was familiar with such wires and their insulation, but who is injured while moving electric lamps by touching such span wire and an iron post which sustains it at the same time, thereby completing the circuit, when there were circuit brakes to prevent the post from being charged from the wire.

The want of guard wires between a telephone wire and a dangerous trolley wire is held in McKay v.

Southern Bell Teleph. & Teleg. Co. (Ala.), 31 L. R. A. 389, sufficient to make the telephone company and the trolley company jointly liable for an injury caused by contact of a broken telephone wire with the trolley wire.

### WHAT AN ATTORNEY MUST BE.

The Supreme Court of Connecticut has very properly adopted a high standard in measuring the professional conduct of members of the bar of that State. Chief Justice Andrews of the Supreme Court of Errors in a case instituted by the Fairfield county bar, to debar one Taylor for unprofessional conduct, concludes his judgment as follows:

"It is not enough for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts in his profession that he does not deserve that confidence, he is no longer an aid to the court, nor a guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the ingenuity of man has been turned that may not become the subject of his inquiries. Then, of course, he must be especially skilled in the books and the rules of his own profession. He must have prudence and tact to use his learning, and foresight and industry and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these faculties, if once the practice becomes to him a mere 'brawl for hire,' or a system of legal plunder where craft and not conscience is the rule, and where falsehood and not truth are the means by which to gain his ends, then he forfeits all right to be an officer in any court of justice or to be numbered among the members of an honorable profession."

## CORRESPONDENCE.

### IS A GOVERNOR OF STATE SUBJECT TO CRIMINAL JURISDICTION.

*To the Editor of the Central Law Journal:*

To what extent is the governor of a State subject to the criminal jurisdiction of the State and municipal courts? This question is propounded on account of a difference of opinion resulting from a cause arising here—and I have not been able from my limited library to throw any light upon the subject. On July 24, in the court room, a circuit judge assaulted the governor, they were both for candidates United States senator, and the occasion was a State canvass. The mayor upon information issued warrants for both, for creating a disturbance in a public place. The judge put up $10 forfeit; the governor refused to notice the process when served and the same was not pressed, and afterwards withdrawn as to both. Please give the information desired with authorities, etc. E.

## BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. XLIX. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1896.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**



1. ADMINISTRATION — Executors and Administrators.—Testator gave certain bank stock to a legatee for life, and, at her death, to be divided among her children. The account of the executor, assigning to the legatee the stock for life "only," was allowed: Held, that the title to the stock after the life estate remained in the executor, making the legatee and the executor the representatives of the entire estate in the stock; and therefore a decree directing its sale in a suit in which both were parties would be binding on the remaindermen.—DROVERS' & MECHANICS' NAT. BANK v. HUGHES, Md., 34 Atl. Rep. 1012.

2. ADMINISTRATION — Executors and Administrators.—Where the probate court approves the executor appointed by the will, an appointment of an administrator to act with him in the administration of the estate is void.—APPEAL OF TERRY, Conn., 34 Atl. Rep. 1032.

3. ADMINISTRATION — Letters of Administration — To Whom Issued.—Section 177, ch. 23, Comp. St. 1895, construed, and held: (1) When a person dies intestate, being an inhabitant of this State, letters of administration must be granted in the county of which he was an inhabitant at the time of his death. (2) If an intestate, at the time of his death, resided outside this State, and left here an estate to be administered, then an administrator may be appointed in any county in which any of such estate is situate, and the administrator first appointed will be entitled to the entire estate of the intestate in this commonwealth, to the exclusion of administrators appointed afterwards in other counties of the State. (3) The judgment of a county court appointing an administrator is not void because the petition therefor does not allege that the intestate was, at the time of his death, a resident of the State of Nebraska.—SPENCER v. WOLF, Neb., 67 N. W. Rep. 858.

4. APPEAL—Bill of Exceptions.—Where it is assigned as error that a motion of nonsuit was improperly overruled, and it does not appear affirmatively that the bill of exceptions contains all the evidence, it will be presumed, in favor of the judgment of the lower court, that there was sufficient evidence to warrant a submission to the jury.—SCHAFFER v. STEIN, Oreg., 45 Pac. Rep. 301.

5. APPEAL — Garnishment.—Gen. St. § 1237, provides, in regard to garnishment proceedings, that where it appears that the garnishee is not indebted to and has not effects of the defendant in his hands, he shall be entitled to judgment for costs. No rule of taxation is prescribed: Held, that the taxation of costs in favor of the garnishee was a matter in the discretion of the trial court, and therefore was not appealable.—WELLES v. SCHROEDER, Conn., 34 Atl. Rep. 1051.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Sales by Assignee.—Under Act Feb. 17, 1876, authorizing the court, where land is sold by an assignee for the benefit of creditors, on petition of the purchaser, to direct that the purchaser be put in possession, the court, on petition by such a purchaser to be put in possession,—the possession being detained from him by the wife of the assignor, who joined in the assignment, reserving, though, to herself her separate estate,—cannot pass upon an adverse claim by the wife to the land as her separate property.—LUTZ v. KEGGERIES, Penn., 34 Atl. Rep. 1021.

7. ASSIGNMENTS—Validity.—Where the obligee in a bond assigned their several interests therein to plaintiffs by separate instruments, such separate assignment cannot be pleaded as a defense in an action brought by the assignees jointly on the ground that the rights of the obligors were thereby prejudiced, their entire liability being brought into question by the joint action.—MCELROY v. WILLIAMS, Wash., 45 Pac. Rep. 306.

8. ATTACHMENT — Motion to Dissolve — Burden of Proof.—Where the facts stated in an affidavit for an attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain, by proof, his charges. An order discharging an attachment, made upon conflicting evidence, will not be disturbed by a reviewing court unless the decision is clearly and manifestly wrong.—GENEVA NAT. BANK v. BAILOR, Neb., 67 N. W. Rep. 865.

9. ATTORNEY AND CLIENT—Contracts.—Where the relation of lawyer and client exists, and the lawyer receives from his client security for his compensation, the burden of proving the fairness of the transaction is upon the lawyer, and the security will be suffered to stand only for the amount shown to be justly due upon it.—PORTER v. BERGEN, N. J., 34 Atl. Rep. 1067.

10. BENEVOLENT SOCIETY—Expulsion of Members.—A member of a benefit society, who has been expelled, cannot resort to the courts for reinstatement without first exhausting the remedies provided by the constitution and by-laws of the society; and this, though the order of expulsion be void.—KEEFE v. WOMEN'S CATHOLIC ORDER OF FORESTERS, Ill., 44 N. E. Rep. 401.

11. BILLS AND NOTES — Certification by Bank.—The certification by a bank of a note made payable at such bank, where the maker keeps an account, is an absolute promise by the bank to pay such note, not as the debt of another, but as its own obligation, entitling the holder to suspend any remedy against the maker and relax steps to charge an indorser, and cannot be rescinded by the bank because made under a misapprehension of fact as to the sufficiency of the maker's account to meet the note.—RIVERSIDE BANK v. FIRST NAT. BANK OF SHENANDOAH, U. S. C. C. of App., 74 Fed. Rep. 276.

12. CONFLICT OF LAW — Foreign Building and Loan Associations — Validity of Contract.—A note executed in Tennessee to a building and loan company incorporated under the laws of, and having its office and principal place of business in Minnesota, and made payable at such office, is a Minnesota contract, and governed by the laws of the latter State.—PIONEER SAVINGS & LOAN CO. v. CANNON, Tenn., 36 S. W. Rep. 386.

13. CARRIERS OF GOODS—Connecting Carriers — Burden of Proof.—To exonerate the last of connecting carriers from liability for injuries to goods in transit, the burden is upon it to show that the injuries did not occur on its line.—LOUISVILLE & N. R. CO. v. TENNESSEE BREWING CO., Tenn., 36 S. W. Rep. 392.

14. CHATTEL MORTGAGE — Laborer's Lien on Crop—Priority.—Under 1 Code, § 1695, providing for a laborer's lien on crops, and that it shall be "prior to all other liens," such lien is superior to that of a chattel mortgage executed before the crop was grown.—STETTON v. DUBOIS, Wash., 45 Pac. Rep. 303.

15. CONSTITUTIONAL LAW—Justices of the Peace—Appointment.—Const. art. 6, § 28, provides that justices of the peace in Chicago shall be appointed by the governor, by consent of the senate (but only upon the recommendation of a majority of the judges of the circuit, superior, and county courts), and hold office for four years, and until their successors are qualified, but that they may be removed by summary proceeding in the circuit or superior court, for malfeasance: Held, that though the power to appoint successors to such justices is vested in the governor, by consent of the senate, he can appoint only on the recommendation of a majority of the judges.—MCDOUGALL v. O'TOOLE, Ill., 44 N. E. Rep. 886.

16. CONSTITUTIONAL LAW — Municipal Corporations—Defective Streets.—Denver City Charter, art. 9, § 9, which provides that, before a city shall be liable for damages to any person injured upon its streets, the person so injured must, within 30 days after receiving such injuries, give the mayor or city council notice thereof in writing, stating fully when, where, and how the injuries occurred, and the extent thereof, is constitutional, since the legislature may regulate the duties and obligations of municipal corporations by such provisions as are revisory or amendatory of the original charter.—CUNNINGHAM v. CITY OF DENVER, Colo., 45 Pac. Rep. 356.

17. CONTRACT—Breach.—When a party has been induced to make a payment of money for a consideration, the withdrawing or withholding that consideration entitled the party making the payment to a return of his money.—MECHANICS' & TRADERS' INS. CO. v. MCLAIN, La., 20 South. Rep. 78.

18. CONTRACT—Consideration.—Plaintiff delivered to defendant a warehouse receipt belonging to plaintiff's client, and notified defendant, who was an attorney for a judgment creditor of such client, that plaintiff claimed a lien on such receipt for attorney's fees, and defendant agreed to sell the wheat represented by the receipt, and pay to plaintiff the amount of his lien, and apply the remainder on the judgment: Held, that possession of the warehouse receipt and the subsequent possession of the proceeds of the sale of the wheat was a sufficient consideration for defendant's promise to pay plaintiff therefrom the amount of his lien.—ROLLINS v. HARE, Ind., 44 N. E. Rep. 374.

19. CONTRACTS—Illegal Agreements.—An agreement which controls or restricts, or tends or is calculated to control or restrict, the free exercise of a discretion for public good, vested in one acting in a public, official capacity, is illegal, and so reprobated by the courts that no redress will be given to a party who sues for himself in respect of it.—HOPE v. LINDEN PARK BLOOD-HORSE ASS'N, N. J., 34 Atl. Rep. 1070.

20. CONTRACTS — Premium for Architect's Designs.—Pursuant to authority given by an act of the legislature, a board of commissioners advertised for plans for a building to be erected in behalf of the city of New York. The advertisement stated that the plans offered would be submitted to a committee of architects, who would select the best six plans; that the designor of the one adjudged by the board of commissioners to be first best would be appointed architect of the building, and the designers of the other five would each receive a premium of $2,000. Plaintiff, among many others, submitted plans. The committee of architects made its reports, but, before the board of commissioners had made a decision, the act authorizing the erection of the building was repealed. Plaintiff then sued the city for his services in preparing the plans. No evidence was offered to show that plaintiff's plans were among the best six selected by the committee: Held, that plaintiff had no cause of action.—AUDSLEY v. MAYOR,

ETC. OF CITY OF NEW YORK, U. S. C. C. of App., 74 Fed. Rep. 274.

21. CONTRACTS—Rescission.—A valid contract is not annulled by a subsequent contract between the same parties relating to the same matter, which is void under the statute of frauds.—HARVEY v. MOREY, Colo., 45 Pac. Rep. 383.

22. CORPORATIONS—Authority to Become Surety.—Where it appears that it was customary for corporations dealing in lumber to become sureties on building contractors' bonds in order to get business, articles of incorporation providing that the corporation may do all things necessary to carry on the business of manufacturing and dealing in lumber will be construed as granting the power to become surety on contractors' bonds, in the absence of any express statutory prohibition.—WHEELER, OSGOOD & CO. v. EVERETT LAND CO., Wash., 45 Pac. Rep. 316.

23. CORPORATIONS — Liability of Stockholders.—Where a statute creates a liability against the stockholders of a corporation, and prescribes a remedy for its enforcement, that remedy is exclusive.—RUSSELL v. PACIFIC RY. CO., Cal., 45 Pac. Rep. 323.

24. COUNTERCLAIM — Demand Accruing after Commencement of Action.—In an action on a duebill which plaintiff claimed was assigned to him by the payee, defendant pleaded as a counterclaim an account against such payee bearing date subsequent to the action; and there was no affirmative proof that such account existed, in favor of defendant or any other person, when suit was brought: Held, that evidence of the account was properly excluded, under Comp. Laws, § 4915, which only authorizes demands, "existing at the commencement of the action" to be counterclaimed.—KIRBY v. JAMESON, S. Dak., 67 N. W. Rep. 54.

25. CRIMINAL LAW — Conspiracy. — Where persons combine to defraud another by false representations as to the title to land which they propose to sell him, they are guilty of conspiracy, though the falsity of the representations can be ascertained by him from an examination of the abstract of title furnished him, and he is not in any manner prevented from making investigation.—MILLER v. PEOPLE, Colo., 45 Pac. Rep. 408.

26. CRIMINAL LAW — Embezzlement.—The evidence showed that defendant was a collector for the owner of a laundry; that he was to receive as compensation 22 per cent. of the laundry work brought in by him; that no accounts were kept between the laundry and its patrons; that defendant was charged with the bundles brought in by him, and credited with 22 per cent. of the amount and whatever cash he paid in; and that he was responsible for the amounts charged to him for work done for patrons, whether collected by him or not: Held that, though defendant failed to pay in the money collected by him from patrons, the relation between him and such owner was that of debtor and creditor, and he was not guilty of embezzlement.—STATE v. COVERT, Wash., 45 Pac. Rep. 304.

27. CRIMINAL LAW—False Personation.—Under Mill. & V. Code, § 5621, providing that any person who shall personate another in any legal proceeding, and shall in his assumed character do any act whereby the interest of the party personated is affected, shall be guilty of a criminal offense, an indictment which charges that defendant falsely personated a party in a civil suit by accepting service of process therein, and which sets out the facts connected therewith, is sufficient, though it does not show how such false personation would or could affect the right or interest of the party personated.—EDGAR v. STATE, Tenn., 36 S. W. Rep. 879.

28. CRIMINAL LAW—Forgery—Certificate of Record.—The false and fraudulent indorsement of a certificate of record on a deed, purporting to be made and signed by the recorder in his own handwriting, is forgery, under Pen. Code, § 470, providing that one who counterfeits or forges the seal or handwriting of another is guilty of forgery.—PEOPLE v. TURNER, Cal., 45 Pac. 331.

29. CRIMINAL LAW—Forgery—Misspelling of Name.—The fraudulent and felonious indorsement of the name of the payee of a certificate of deposit thereon by another is forgery, although the name is misspelled.—PEOPLE v. ALDER, Cal., 45 Pac. Rep. 327.

30. CRIMINAL LAW — Former Acquittal — False Pretenses.—On the trial of an indictment charging defendant with larceny by means of false impersonation, the proof showed that the defendant had obtained the property by false pretenses, and the court dismissed the indictment, directing that defendant be held for obtaining goods under false pretenses: Held, that the judgment of dismissal under the former indictment was not a formal acquittal barring the prosecution of the charge of obtaining goods under false pretenses.—STATE v. REIFF, Wash., 45 Pac. Rep. 318.

31. CRIMINAL LAW—Homicide—Self-defense.—Where an officer who is assaulted in making an arrest believes, upon reasonable grounds, that he is about to receive great bodily harm, he is not obliged to "retreat to the wall," but may stand his ground, and kill his assailant, if necessary.—BOYKIN v. PEOPLE, Colo., 45 Pac. Rep. 419.

32. CRIMINAL LAW—Indictment.—An indictment will not be quashed for defects in the form of the venire for grand jurors where the motion to quash was not made until the second term, and until after defendant had obtained a continuance. — COMMONWEALTH v. WINDISH, Pa., 34 Atl. Rep. 1019.

33. CRIMINAL LAW — Indictment and Information—Without Preliminary Examination.—Information Act 1893, § 8, providing that, if a preliminary examination has not been had, the district attorney may by leave of the court, and upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person charged, file an information, and process shall forthwith issue thereon, is not in violation of Const. art. 2, § 7, providing that no warrant shall issue without describing the person to be seized, nor without probable cause, supported by oath or affirmation.—HOLT v. PEOPLE, Colo., 45 Pac. Rep. 374.

34. CRIMINAL PRACTICE — Assault with Deadly Weapon.—An information charging an assault with a deadly weapon by cutting and wounding the prosecuting witness with a razor is not rendered insufficient, by the fact that the assault was charged to have been made with intent to inflict a "personal" injury, instead of a "bodily" injury, which is the language of the statute; the word "personal" in the connection in which it was used, having the same meaning.—STATE v. CLAYBORNE, Wash., 45 Pac. Rep. 303.

35. DEATH BY WRONGFUL ACT—Action—Pleading.—In an action to recover the statutory forfeiture of $5,000 for the death of a person occasioned by the negligence of a driver of a street car, under the provisions of Rev. St. 1889, § 4425, the setting out in the petition of a city ordinance regulating the running of street cars, and prescribing the duties of those in charge of them, together with an allegation that the death of plaintiff's decedent was caused by a failure to observe such ordinance, is not a statement of a separate cause of action based upon a violation of the ordinance, but the pleading of such violation as furnishing proof of the negligence of the driver, the consequence of which, when resulting in a death, is fixed by the statute.—MEYER v. SOUTHERN RY. CO., Mo., 36 S. W. Rep. 867.

36. DEED—Statute of Uses—Operation.—A deed conveying land in trust to the use of a firm, which does not describe the nature of the trust, give the names of the partners, nor specify the interest of the partnership, is not executed by the statute of uses (1 Starr. & C. Ann. St. ch. 30, § 3), providing that a conveyance in trust to the use of "any other person or persons or of any body politic" shall vest the title in fee in the *cestuis que*

*usent;* since a partnership, not being a person or body politic, within the statute, the interests of the *cestuis que usent* are undetermined, and the trustee must therefore retain the legal title, to ascertain them and the names of the partners to whom to convey the partnership interest.—SILVERMAN v. KRISTUFEK, Ill., 44 N. E. Rep. 430.

37. DEED TO HUSBAND AND WIFE—Construction.—Where lands are granted to a husband and wife, and it appears from the words of the grant that the intent was to create a tenancy in common, they will take and hold the lands granted as tenants in common, and not as tenants of the entirety.—FULPER v. FULPER, N. J., 34 Atl. Rep. 1063.

38. DEDICATION—Acceptance.—Where the acts of an owner of real estate are relied upon to prove that he has dedicated it to the public, the acts must be such as to clearly manifest an intention on his part to dedicate it, and the public must have so acted with reference to the property as to indicate an intention of acceptance of the property dedicated.—CITY OF OMAHA v. HAWYER, Neb., 67 N. W. Rep. 891.

39. DIVORCE—Injunction Pendente Lite.—In an action for divorce the court has jurisdiction, in a proper case and on a proper showing, to grant an injunction *pendente lite*, restraining plaintiff from alienating his separate property.—IN RE WHITE, Cal., 45 Pac. Rep. 323.

40. EASEMENT—Construction of Grant.—A grant of a passageway over grantor's land, so far as it is ambiguous and uncertain, should be construed with reference to the circumstances surrounding the grant, and the nature, condition, and the use of the subject-matter at the time the deed was executed should be regarded; but, under the guise of construction, no new and different contract in lieu of that made by the parties can be created.—MINERAL SPRINGS MANUF'G CO. v. MCCARTHY, Conn., 34 Atl. Rep. 1043.

41. EJECTMENT — Evidence.—In ejectment against a mere intruder, who offers no evidence and sets up no title in himself, plaintiff makes out a *prima facie* title, sufficient to raise a presumption of ownership, by proving the possession of one under a deed, and that his title passed by regular conveyances to plaintiff.—COOMBS v. HERTIG, Ill., 44 N. E. Rep. 392.

42. EXECUTION AGAINST THE PERSON.—Comp. Laws, § 5115, provides that an execution shall not issue against the person of a judgment debtor unless an order of arrest has been served, or unless the complaint contains a statement of facts showing one or more causes of arrest: Held that, in an action on a purchase-money note, allegations of the complaint that the note was given for goods obtained by false pretenses are immaterial, and therefore the arrest of defendant was not authorized unless an order for his arrest issued before judgment.—GRIFFITH v. HUBBARD, S. Dak., 67 N. W. Rep. 850.

43. EXECUTION — Exemptions — Claims for Wages.—An employee who so far retains the control of the work in hand that he is not subject to the direction of his employer while engaged thereat is an independent contractor, and not within the exception of section 531, Civ. Code, relating to clerks', laborers', and mechanics' wages.—FOX v. MCCLAY, Neb., 67 N. W. Rep. 888.

44. GAME LAWS—Fish—Constitutional Law.—A body of water covering 1,040 acres, 1,000 of which are owned by defendant, and 40 by another person, is not a "private pond," within the meaning of Acts 1895, ch. 127, providing that the act, which prohibits the destruction or capture of fish except in a certain manner, shall not apply to private ponds.—PETERS v. STATE, Tenn., 36 S. W. Rep. 399.

45. GARNISHMENT — Notice to Garnishee. — Where, pending an action on a fire policy, a creditor of the plaintiff garnishes the proceeds of the policy in defendant's hands, and defendant answers the garnishment complaint, the company is charged with notice of the lien created by the garnishment when judgment is rendered against it on the policy though the garnishment proceedings have not been properly indexed by the clerk.—WARD v. WARD, Wash., 45 Pac. Rep. 312.

46. GUARANTY.—A guaranty of "the full, prompt and ultimate payment" of all commercial paper which the guaranty may "have discounted, or may hereafter discount," for a corporation of which the guarantors are stockholders, is a continuing guaranty, which covers all renewals, substitutions and extensions made while the contract is in force.—GAY v. WARD, Conn., 34 Atl. Rep. 1025.

47. HABEAS CORPUS — Collateral Attack. — Where it appears that the subject-matter of a civil action, the amount involved, and the nature of the judgment rendered, were clearly within the court's jurisdiction, and that it was authorized by law to issue process of imprisonment in such a case, the judgment cannot be collaterally attacked on *habeas corpus* by evidence showing that a certain defense existed which, if pleaded, would have defeated the recovery.—BURCHNELL v. DISTRICT COURT OF ARAPAHOE COUNTY, Colo., 45 Pac. Rep. 402.

48. HABEAS CORPUS—Jurisdiction.—Where a prisoner sentenced to the penitentiary is taken to the county jail, and, while there, sues out a writ of error, and obtains a *supersedeas* and an order for his release on bail, and he fails to furnish bail, he is not entitled to a discharge on *habeas corpus*, on the ground that his offense was punishable by imprisonment in the county jail only, and the sentence therefore illegal, since the *supersedeas* relieves him from imprisonment in the penitentiary.—*In re* FARRELL, Colo., 45 Pac. Rep. 438.

49. HUSBAND AND WIFE—General Estate.—Act 1849-50, forbidding the sale of a wife's interest during her life to satisfy the husband's debts, and forbidding him to sell such interest without the consent of the wife, does not affect the husband's common-law right to the usufruct of the general property of the wife during coverture. — BRASFIELD v. BRASFIELD, Tenn., 36 S. W. Rep. 384.

50. HUSBAND AND WIFE—Mortgage of Wife's Realty.—A joint mortgage by husband and wife of land not held to her separate use is valid, though given to secure a note of the wife which is void because of her coverture.—COCKRILL v. HUTCHINSON, Mo., 36 S. W. Rep. 375.

51. INSURANCE—Change of Ownership of Property.—A clause attached to an insurance policy, making the loss if any payable to a third person, "as her interest may appear," her interest not being stated, but she being in fact a mortgagee, does not constitute her the insured, and a subsequent sale to her of the property by the owner, without notice to the company, being in violation of the provisions of the policy, avoids it, not only as to the original owner, but also as to the purchaser.—SCANIA INS. CO. v. JOHNSON, Colo., 45 Pac. Rep. 431.

52. INSURANCE—Conditions.—An insurance company may, by its policy, provide that upon the failure of the insured to pay in full, at maturity, a premium note therein described, said policy shall lapse and remain inoperative while such note remains unpaid, and such condition, unless waived, is a complete defense to an action by the insured for a loss during the period of default.—HOME FIRE INS. CO. v. GARBACZ, Neb., 67 N. W. Rep. 864.

53. INSURANCE—Suspension by Non-payment of Premium. — Aconfession of judgment on past-due note given for premium on an insurance policy, in accordance with an offer of the company that, if the maker would confess and pay the judgment by a certain time, no costs should be charged him, does not revive the policy, contrary to its provisions, no waiver of such provisions being shown.—PROEBSTEL v. STATE INS. CO., Wash., 45 Pac. Rep. 308.

54. INTOXICATING LIQUORS—Civil Damage Act.—The action which arises in favor of a parent against a retail dealer in intoxicating liquors and his bondsmen, because of the death of a son during minority, and the

consequent loss, by the parent, of the services of the minor, when such death is occasioned by the use of intoxicating liquors sold or furnished to the minor by the saloon keeper, or some one acting for him, is by virtue of the provisions of chapter 50 of the Compiled Statutes, entitled "Liquors," and not under the provisions of what is termed the "Civil Damage Act."—FITZGERALD v. DONOHER, Neb., 67 N. W. Rep. 880.

55. IRRIGATION — Priority of Right between Ditch Owners.—In an action by an irrigation company, based on a decree establishing its appropriation of water, to determine the priority of appropriation between its ditch and that of another company situated in another irrigation district, but appropriating water from a tributary of the same stream, it is unnecessary to set out the names of the users of water from plaintiff's ditch, or other facts relating to their individual appropriation.—FARMERS' INDEPENDENT DITCH CO. v. AGRICULTURAL DITCH CO., Colo., 45 Pac. Rep. 444.

56. IRRIGATION—Refusal to Supply Water.—In an action against an irrigation company for refusal to furnish plaintiff water for irrigating land lying under defendant's canal, and having no other source of supply, plaintiff testified that he applied to defendant's manager to learn the water rates, and told him he was willing to pay $1.50 per acre, and that the manager showed and read to him the contract, and said he could not furnish him the water at that rate unless he paid a certain bonus: Held, that the evidence showed a sufficient demand by plaintiff, and an unwarranted refusal by defendant.—NORTHERN COLORADO IRR. CO. v. RICHARDS, Colo., 45 Pac. Rep. 423.

57. JUDGMENT—Confession by Insolvent Debtor.—A judgment confessed by an insolvent debtor cannot be attacked by other judgment creditors for fraud against the debtor, unless there was collusion between him and the creditor, by which the attacking creditors were defrauded.—HAVENS & GEDDIS CO. v. FIRST NAT. BANK OF PANA, Ill., 44 N. E. Rep. 884.

58. JUDGMENT — When Severable—Appeal. — A judgment against several persons for a tort is severable, and an appeal by one does not vacate the judgment as to others.—CHAPIN v. BABCOCK, Conn., 34 Atl. Rep. 1039.

59. JUDGMENTS—Res Judicata — Merger. — A foreign judgment on a note is not *res judicata* in an action on the note in Tennessee, where such judgment has by a circuit court of Tennessee been declared void.—MCCADDEN v. SLAUSEN, Tenn., 36 S. W. Rep. 378.

60. LANDLORD AND TENANT—Dangerous Premises.—Where a lease authorizes the lessee to complete at his own expense an unfinished story of the building so as to fit it for hotel purposes, and provides that the material used is to remain his own, and gives him the right to remove it at the end of the lease, the lessor is not liable for injuries to a guest of the lessee from defects resulting solely from the improvements; and the facts that under the lease a tenancy from month to month was created, and that prior to the accident a monthly reletting occurred after the defective improvements were made, will not render him liable, there being no agreement divesting the lessee of his title to the materials used, and of his right to remove them at the end of the lease.—GLASS v. COLMAN, Wash., 45 Pac. Rep. 310.

61. LANDLORD AND TENANT—Defective Premises.—In an action by a tenant against his landlord for injuries received by the tenant in jumping from the building while it was on fire, and alleged to be due to defendant's failure to provide fire escapes, a charge that at common law a landlord was required to disclose to the tenant any hidden defects in the construction of the building which rendered it unsafe, regardless of the landlord's knowledge of such defects, or diligence in searching therefor, was erroneous; the common law rule being that there is no implied warranty on the part of a landlord that the leased premises are fit for occupation, or fit for the use for which they are let.—SCHMALZRIED v. WHITE, Tenn., 36 S. W. Rep. 393.

62. LIMITATIONS—New Promise and Part Payment.—A payment by one joint maker of a note or an extension procured by him without the assent or subsequent ratification by the other maker is not binding on him, so as to interrupt the running of the statute of limitations.—BOYNTON v. SPAFFORD, Ill., 44 N. E. Rep. 877.

63. LIS PENDENS — Dismissal of Action. — Plaintiff brought action to have a deed executed by her ancestor declared a mortgage, and filed a notice of *lis pendens*. The action was afterwards dismissed without prejudice: Held that, in default of a reinstatement or renewal of the action within a reasonable time, the *lis pendens* was ineffectual to charge a subsequent purchaser with actual or constructive notice of plaintiff's claim.—PIPE v. JORDAN, Colo., 45 Pac. Rep. 371.

64. MANDAMUS.—Under Const. art. 5, § 1, providing that "the judicial power of the State shall be vested in a supreme court of errors, a superior court, and such inferior courts as the general assembly shall, from time to time, ordain and establish," the court of common pleas, established by the general assembly, is inferior to the superior court, and that court may issue a writ of *mandamus*, which it is the duty of the court of common pleas to obey. — BOROUGH OF ANSONIA v. STUDLEY, Conn., 34 Atl. Rep. 1030.

65. MASTER AND SERVANT—Assumption of Risk.—The conductor of an electric railway car assumes, as a matter of law, the risk of injuries received in falling from the car, due to the failure of the company to construct the car with a guard extending outside of the wheels, so as to prevent a person's foot from passing under the wheels of the car.—DENVER TRAMWAY CO. v. NESBIT, Colo., 45 Pac. Rep. 405.

66. MASTER AND SERVANT — Assumption of Risks.—The lineman of the defendant company, in the discharge of his duty, was ordered to take down a guy wire from an electric pole and guy tree. The pole had not been securely planted. It fell on the lineman, inflicting injuries of which he died. The vice of construction was latent and concealed. The officers of a preceding board of management had been notified of the defect. The company is not relieved under the plea of want of notice, although the present general manager had not been notified, but the preceding manager or superintendent.—BLAND v. SHREVEPORT BELT RY. CO., La., 20 South. Rep. 284.

67. MASTER AND SERVANT—Contributory Negligence.—The rule that where an employee, being suddenly ordered into a position of danger by one having authority over him, obeys and is injured, the master will not be relieved from liability, has no application to a case where a car repairer, as he had been in the habit of doing during the entire course of his employment, goes between cars standing on a side track, to make repairs, having flags to indicate his presence set at only one end of the cars.—CHICAGO, R. & Q. R. CO. v. MCGRAW, Colo., 45 Pac. Rep. 384.

68. MASTER AND SERVANT — Negligence. — Where plaintiff, who was employed on the dump of a mine, was injured by rock and debris thrown down from another mine above by employees of defendant, who was operating the latter mine, and had permission to work the same in part through the property on which plaintiff was working, the latter's negligence in working in an exposed place did not relieve defendant from liability, if his employees, with full knowledge of plaintiff's peril, willfully persisted in rolling the rock down upon the place where he was at work.—HECTOR MIN. CO. v. ROBERTSON, Colo., 45 Pac. Rep. 406.

69. MECHANIC'S LIEN—Foreclosure — Judgment. — In an action by several material men to foreclose their respective liens, the court rendered a money judgment for all the plaintiffs, but adjudged that the liens of A and B, two of the material men, were invalid, and decreed that, as the aggregate amount of the liens of the other parties was less than the sum due the contractor, the surplus should be paid to A and B in proportion to the amounts of their judgments: Held, that the judgment was erroneous so far as it authorized the

payment of said surplus to A and B.—KENNEDY & SHAW LUMBER CO. v. PRIET, Cal., 45 Pac. Rep. 336.

70. MECHANIC'S LIEN — Priority of Liens. —A mortgagee, as against whom a mechanic's lien has been adjudged invalid on his answer, may insist on its invalidity on appeal by the lien claimant, though no appeal is taken from that part of the decree holding it valid against the owner of the property.—INMAN v. HENDERSON, Oreg., 45 Pac. Rep. 300.

71. MECHANIC'S LIEN—Foreclosure Sale.—Under Rev. St. ch. 77, §§ 18, 19, providing that, when lands have been sold under decree, defendant may redeem by paying to the purchaser, or to the officer who made the sale, the amount for which the premises were sold, whereupon such sale and the certificate shall be void, and that the purchaser or officer shall make out and record an instrument evidencing such redemption, etc., an assignment of the certificate by the purchaser under a decree foreclosing a mechanic's lien to the person entitled to redeem will not operate as a redemption.—KELLER v. COMAN, Ill., 44 N. E. Rep. 434.

72. MORTGAGE OF HOMESTEAD.—When a party sells the homestead for an existing debt as the price, and immediately the purchaser transfers it back to the vendor, and takes a mortgage and vendor's lien on the property, the transaction will be viewed as one of mortgage to secure the debt, and in violation of article 222 of the constitution.—STEWART v. SUTTON, La., 20 South. Rep. 283.

73. MUNICIPAL CORPORATIONS—Contracts with Water Companies—Ordinance.—In an action by a water company to enjoin the enforcement of an ordinance fixing rates to be charged consumers, on the ground that it violates a contract between the city and the company, whereby such rates were not to be less than those charged in other cities in the State similarly situated, the burden is on plaintiff to prove a substantial difference between the rates as fixed and as they should be fixed, and to show wherein there is such a difference as to justify the interposition of equity.—LEADVILLE WATER CO. v. CITY OF LEADVILLE, Colo., 45 Pac. Rep. 362.

74. MUNICIPAL CORPORATIONS — Railroad Right of Way.—The right of way owned by a railroad company may be assessed for the improvement of a street on which it abuts; and, in an action brought under the statute by a contractor to recover such assessment, a personal judgment may be rendered against the company.—PITTSBURG, C., C. & ST. L. RY. CO. v. HAYS, Ind., 44 N. E. Rep. 375.

75. NATIONAL BANKS — Preliminary Organizations — Powers.—Under the provision of the national banking law (Rev. St. U. S. § 5136) that "no association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking," a lease by an association formed under said act, but not authorized by the comptroller to commence the business of banking, of premises "to be used as a banking office, and for no other purpose," is *ultra vires* and void, and there can be no recovery against the association for the rental of such premises, except upon the ground and to the extent of the benefits received.—MCCORMICK v. MARKET NAT. BANK OF CHICAGO, Ill., 44 N. E. Rep. 381.

76. NEGLIGENCE—Electric Light Companies.—A person using a public street has a right to presume that it is free from dangerous obstacles; and the mere fact that he receives injury by coming in contact with such an obstacle does not warrant the conclusion that he contributed to the injury by his own negligence.—SUBURBAN ELECTRIC CO. v. NUGENT, N. J., 34 Atl. Rep. 1069.

77. NEGOTIABLE INSTRUMENTS—Description of Payee. —A note made by a corporation, payable to "P, president" (P being president of the corporation), must be regarded as payable to P, the word "president" being merely descriptive; and an indorsement by "P, President," is an indorsement by P individually.—HATHEWAY v. PIKE, Ill., 44 N. E. Rep. 441.

78. OFFICE AND OFFICERS—Loaning of Public Funds. —An official who loans county money in violation of the statute cannot maintain an action to recover it, though the county might do so if necessary for its protection.—WINCHESTER ELECTRIC LIGHT CO. v. VEAL, Ind., 44 N. E. Rep. 353.

79. OFFICE AND OFFICERS—School Trustees—Appointments to Office.—An outgoing board of trustees of public schools cannot appoint to an office that will not become vacant during the term of their own official life.—STATE v. SMITH, N. J., 34 Atl. Rep. 1058.

80. OFFICE AND OFFICERS—State Officers.—The incumbent of the office of steam boiler inspector, established by the legislature in 1889, is an officer of one of the departments of the State, so as to render his salary a preferred claim against the State.—PEOPLE v. GOODYKOONTZ, Colo., 45 Pac. Rep. 414.

81. OFFICERS—Vacancy in Office.—Rev. St. 1894, § 7[illegible] (Rev. St. 1881, § 5567), relating generally to filling vacancies in public offices, and providing that "every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof," applies to all appointments made to fill vacancies in offices created by the legislature when no different provision is made therefor in the constitution or other statutes.—CARSON v. STATE, Ind., 44 N. E. Rep. 360.

82. PLEDGE OF CORPORATE STOCK.—The pledgee of corporate stock, the contract of pledge being silent on the subject, has not the right, by virtue of the pledge, before maturity of the debt, to have the stock transferred on the books into his name.—SPRECKELS v. NEVADA BANK OF SAN FRANCISCO, Cal., 45 Pac. Rep. 329.

83. PRINCIPAL AND AGENT—Real Estate Brokers—Authority.—Authority to sign an agreement for the sale of lands, binding on the principal under the statute of frauds, may be conferred upon an agent by parol. Such authority may be established by proof that it was expressly conferred, or by proof of circumstances from which it may be reasonably inferred.—O'REILLY v. KEIM, N. J., 34 Atl. Rep. 1073.

84. PRINCIPAL AND SURETY — Extension of Time of Payment.—The extension of the time of payment of a note in consideration of payment of interest in advance was a contract for an extension, founded on a valuable consideration, and released the surety from liability.—BINNIAN v. JENNINGS, Wash., 45 Pac. Rep. 302.

85. PROHIBITION, WRIT OF.—Where the record discloses a failure of jurisdiction, or an unwarranted exercise of judicial authority, causing an immediate and wrongful invasion of property rights, a writ of prohibition will lie to prevent the execution of an order of the lower court, or to set aside proceedings already had, either at law or in equity.—ST. LOUIS, K. & S. R. CO. v. WEAR, Mo., 36 S. W. Rep. 257.

86. QUIETING TITLE.—In an action to quiet title, defendant must set up some adverse claim to or interest in the property, and the nature of such claim; and, where the answer discloses that defendant's interest is junior and subject to plaintiff's, it constitutes no defense to the action.—WESTON v. ESTEY, Colo., 45 Pac. Rep. 367.

87. RAILROAD COMPANY — Elevated Railway — Damages.—In an action against an elevated railway company for damages to the rental value of abutting property, it was error to exclude testimony of plaintiff's tenant that the rent of the premises had been reduced on account of the construction and operation of the railway.—BIRCH v. LAKE ROLAND EL. RY. CO., Md., 34 Atl. Rep. 1013.

88. RAILROAD COMPANY — Elevated Railways — Damages—Estoppel.—The fact that the president and several members of an association signed a petition an-

ing that authority might be granted for the defendant corporation to build an elevated railway will not, in the absence of anything to show that the signers had power to bind the association or had assumed to act for it, estop it from claiming damages for injuries to its property caused by the construction of the road.—LAKE ROLAND EL. RY. CO. v. HIBERNIAN SOC. OF BALTIMORE, Md., 34 Atl. Rep. 1017.

89. RAILROAD COMPANY—Killing Stock — Negligence.—In an action for the value of stock killed by a railroad train, where the evidence was conflicting as to whether the engineer had turned off the steam and tried to stop the train after the cattle were in view, the question of negligence was for the jury.—HUTCHINSON v. CHICAGO, M. & ST. P. RY. CO., S. Dak., 67 N. W. Rep. 853.

90. RAILROAD COMPANY—Street Railroad—Negligence.—The question of the negligence of a passenger on an electric street car in leaving his seat and stepping onto the footboard while the car was still in motion was one of fact for the jury.—DENVER TRAMWAY CO. v. REID, Colo., 45 Pac. Rep. 378.

91. RAILROAD COMPANY—Street Railways.—In an action for injuries from a collision with a street car, the defense of contributory negligence being in issue, and the weight of the evidence showing that the accident was unavoidable, or due to contributory negligence, the court instructed the jury that the sole issue in the case was whether defendant had been negligent: Held, a misdirection, as omitting the issue as to contributory negligence.—DENVER TRAMWAY CO. v. LASSASSO, Colo., 45 Pac. Rep. 409.

92. RAILROAD COMPANIES—Accidents at Crossings.—A person who drives across a railroad track at a public crossing where the company's yard is located, and whose horse, frightened by the noise of steam escaping from a "shifting" engine standing near the highway, runs away, cannot recover from the railroad for injuries received in such accident, without showing that the amount of steam escaping or the noise made thereby was unusual or unnecessary.—PHILADELPHIA, W. & B. R. CO. v. BURKHARDT, Md., 34 Atl. Rep. 1010.

93. RAILROAD COMPANIES — Consolidation—Condemnation Proceedings. — Proceedings instituted by a railroad company to acquire lands by condemnation for its road, in which commissioners have made their report and award of damages, from which the landowner has appealed to the circuit court, do not become void *ab initio*, nor abate, by reason of the consolidation and merger of the condemning company with another railroad company, forming a new corporation; but the rights in the land acquired by the condemnation proceedings survive, and pass to the new corporation, and it may be lawfully substituted as appellee in the circuit court, and the causes then proceed to trial.—DAY v. NEW YORK, S. & W. R. CO., N. J., 34 Atl. Rep. 1081.

94. RAILROAD COMPANIES—Highway Crossing—Negligence.—Where a railroad company, during increased travel over a highway crossing, of its own volition temporarily maintains a flagman there for the purpose of warning travelers of the approach of trains, whether in a certain case, the flagman was negligent in not warning a traveler in time to avoid a collision with a train, and the traveler was chargeable with contributory negligence, are questions of fact, to be determined by the trior, and will not be reviewed on appeal.—DUNDON v. NEW YORK, N. H. & H. R. CO., Conn., 34 Atl. Rep. 1041.

95. RAILROAD COMPANIES — Lease — Negligence.—While a railroad company cannot, by leasing its line without authority of law, relieve itself of any liability flowing from the manner of its operation, nor, by leasing its line under authority of law, relieve itself of the responsibilities imposed upon it by the law of its incorporation, or of liability in the discharge of the positive duties which it owes to the public, yet a railroad company which has leased its line, under due legislative authority, is not liable for the negligent management of the road over which it has no control.—HAYES v. NORTHERN PAC. R. CO., U. S. C. C. of App., 74 Fed. Rep. 279.

96. RAILROAD COMPANIES—Right of Way—Crossings.—One whose land was intersected by the proposed line of a railway company conveyed to the company the right of way, the deed requiring the company to construct a suitable road crossing. Subsequently, the company filed its location, on which the crossing was represented by a dotted line intersecting the right of way, stating that the land taken was most of the way a certain width, but not showing an intention to abrogate the crossing: Held, that the location did not extinguish the landowner's right to a crossing.—HAMLIN v. NEW YORK, N. H. & H. R. CO., Mass., 44 N. E. Rep. 444.

97. RECORD—Notice—Bona Fide Purchaser.—Where the grantee in a trust deed, given to secure a note, by mesne conveyances, from the grantor, acquired his equity in the land, and then, without authority from or knowledge of his principal, before maturity of the note, and without payment thereof, executed a deed of release to the grantor in the trust deed, thus vesting the title in fee himself, and the instruments were all of record, the record was constructive notice to a subsequent mortgagee of the trustee that the release was unauthorized, and the trust deed therefore a lien on the land, to which his own mortgage was subject.—APPLEMAN v. GARA, Colo., 45 Pac. Rep. 366.

98. RELIGIOUS SOCIETY — Churches — Expulsion of Minority.—The majority of a church cannot, having abandoned the religious faith on which it was founded, hold the church property against the minority adhering to such faith.—SMITH v. PEDIGO, Ind., 44 N. E. Rep. 363.

99. SALE—Bill of Lading to Shipper's Order.—Where goods are shipped by bill of lading running to the order of the shipper, title does not, in the absence of a contract to the contrary, pass to the person who has ordered the goods, so as to make him liable for deterioration during transit; and evidence of custom to the contrary is not admissible. — CHARLES v. CARTER, Tenn., 36 S. W. Rep. 396.

100. SALE—Conditional Sale—Mortgage.—A mortgagee of a conditional vendee in possession of chattels is not a purchaser within the meaning of section 25, ch. 32, Comp. St., and the rights of the conditional vendor thereof are prior and paramount to the lien of such mortgagee under his mortgage.—MCCORMICK HARVESTING MACH. CO. v. CALDEN, Neb., 67 N. W. Rep. 863.

101. STATUTES—Amendment.—It is only where an act of the legislature is incomplete in itself, but manifestly amendatory of some existing statute to which it does not refer, that it is within the inhibition of the constitutional provision that "no law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed."—STATE v. MOORE, Neb., 67 N. W. Rep. 876.

102. STATUTES—Enforcement.—Where a statute cannot be sustained in its entirety by reason of the unconstitutionality of some provision thereof, such parts of the act as can reasonably be executed will be put in force, provided the objectionable feature is separable as a distinct thing from the body of the act, and it does not appear to have been the legislative design to make it a necessary part of the enactment.—STATE v. COMMITTEE OF TOWNSHIP OF FRANKLIN, N. J., 34 Atl. Rep. 1088.

103. TAXATION — Exemptions — Corporate Stock.—A charter which exempts a corporation or its property from taxation exempts also the shares of its stock held by individuals.—STATE v. HEPPENHEIMER, N. J., 34 Atl. Rep. 1061.

104. TAXATION—Irrigation District.—Under St. 1887, p. 40, § 18, subd. 3, providing the manner of assessment of city and town lots, it is proper to assess contiguous

lots owned by one person, and used together, and on which is a building covering a part of each lot, together, as one parcel.—COOPER v. MILLER, Cal., 45 Pac. Rep. 325.

105. TAXATION—Tenant by the Curtesy.—Under Gen. St. § 3845, providing that when real estate is in possession of a tenant for life, and another person is entitled to the ultimate enjoyment, such estate shall be set in the list of the life tenant, except where otherwise specially provided; and section 3890, declaring that the estate of any person in any portion of real estate which is by law set in his list for taxation shall be subject to a lien for that part of his taxes upon the valuation as found in said list—a tenant by the curtesy is alone personally liable for taxes legally assessed during his life, and only his interest is subject to a lien therefor. —WHITE v. TOWN OF PORTLAND, Conn., 34 Atl. Rep. 1022.

106. TAXATION—Statutes — Construction.—Act March 24, 1879, constituting the commissioners of the county a board of turnpike directors, making it their duty to certify to the county auditor each year the amount necessary to keep such free turnpikes in good repair, and providing that on the issue of such certificate the auditor shall levy on "all the taxable property of said county" a tax to constitute a turnpike fund, does not limit the taxable property to that outside of incorporated cities and towns of the county.—BYRAM v. BOARD OF COM'RS OF MARION COUNTY, Ind., 44 N. E. Rep. 354.

107. TELEPHONE COMPANIES—Construction of Lines. —It is not necessary for a common council, in designating the several streets through which a telephone company shall construct its line, to specify the precise place in the street where each pole shall be located, nor to require the company to obtain the consent of abutting owners before erecting poles in front of their respective lots.—STATE v. MAYOR, ETC. OF CITY OF BAYONNE, N. J., 34 Atl. Rep. 1080.

108. TRUST — Express Trusts — Parol Evidence.— Though a trust in real estate cannot be created by parol, the same rule does not apply to personal property; and, if a grantee sells the land under a parol agreement to convert it into money and pay the grantor's debts, his subsequent acknowledgment of the trust will bind him.—COOPER v. THOMASON, Oreg., 45 Pac. Rep. 296.

109. TRUST — Resulting and Express Trusts.—At a sheriff's sale of land, complainant and defendant jointly bid in the property, and each paid one-half of the price. Afterwards they orally agreed that the sheriff should convey the property to the defendant alone, and that he should hold it for the equal benefit of himself and the complainant, and such conveyance was accordingly made: Held, that the complainant had a resulting trust in the land, arising out of the payment of half the price, and not an express trust depending on the oral agreement.—TYNAN v. WARREN, N. J., 34 Atl. Rep. 1065.

110. TOLL ROADS—Right to Maintain.—The right to construct and maintain a toll road and to collect tolls is not a common right, but exists only by virtue of a grant from the legislature, and is subject to all such limitations as the legislature may see fit to impose.— VIRGINIA CANON TOLL-ROAD CO. v. PEOPLE, Colo., 45 Pac. Rep. 398.

111. TRESPASS—Injunction — Irreparable Injury.— Where acts of trespass are repeated, continuing, and ruinous, or the damages irreparable, and a remedy at law would be inadequate, an injunction will lie.— STRAWBERRY VALLEY CATTLE CO. v. CHIPMAN, Utah, 45 Pac. Rep. 348.

112. VENDOR AND PURCHASER — Sales — Delivery.— Where heavy printing machinery and appliances located in leased rooms are sold in good faith, the locking of the doors and surrender of the keys by the vendor to the vendee is a sufficient delivery of the property sold.—A. N. KELLOGG NEWSPAPER CO. v. PETERSON, Ill., 44 N. E. Rep. 411.

113. VENDOR AND PURCHASER—Sale of Real Estate—Payment to Agent.—Where land is intrusted to real estate agents to sell and collect the purchase money, the purchaser is entitled to credit for payment to an agent of the real estate agents, though made after he was discharged, he having been held out as authorized to receive payments due on contracts, and notice of withdrawal of his authority not having been given to the purchaser.—MEEKER v. MANNIA, Ill., 44 N. E. Rep. 397.

114. WILL—Charities — Bequests.—A testator devised the residue of his estate to two trustees (whose places in case of vacancy were to be filled by appointment), to be distributed by them in certain proportions to certain corporations, in trust for charitable uses, one of such portions being given to the State, the income to be applied to the "maintenance of any institution for the care of idiots, imbeciles, or feeble-minded persons;" providing, further, that, if any of the trusts should not be accepted, that portion should be distributed proportionally among such as were accepted, and, in order that his purposes might not be defeated, that these devises in trust should be effective notwithstanding any deficiencies of description: Held, that on refusal of the State, which is competent to accept such a trust, its portion should be distributed in trust among those corporations which had accepted.—IN RE PRESIDENT AND FELLOWS OF YALE COLLEGE, Conn., 34 Atl. Rep. 1036.

115. WILL—Olographic Will.—The requirement of the Code that an olographic will shall be dated requires that the day of the month shall be stated. The day is part of the date, and the month and year, without the day of the month, avoid an olographic will.—HEFFNER v. HEFFNER, La., 20 South. Rep. 281.

116. WILLS — Annuities.—Testator, after certain specific devises, gave the residue of his estate to trustees, to manage the estate and invest all moneys coming to their hands in good securities, and to pay to the widow, out of "the moneys so arising from the estate" a certain annuity, in monthly installments, and directed the trustees, on division of the estate among testator's children, to retain in their hands sufficient capital to insure, from the income arising from the same, the prompt payment of the monthly allowance, and further directed that, on the death of the widow, the securities retained should be divided among his children. The trustees were given power to sell and convey any and all real estate: Held that, in case the income of the estate was insufficient to pay the widow's annuity, she was not entitled to resort to the corpus of the estate to make up the deficiencies.— EINBECKER v. EINBECKER, Ill., 44 N. E. Rep. 426.

117. WILLS—Mental Capacity.—Where the proponents of a will have made a *prima facie* case by statutory proof of due execution, and of testator's mental capacity, the legal presumption that testator was sane casts on contestants the burden of proving the contrary.—CRAIG v. SOUTHARD, Ill., 44 N. E. Rep. 813.

118. WILLS—Renunciation—Record.—Before a renunciation of a testamentary provision by a surviving husband or wife shall become a bar to any subsequent claim thereto by such survivor, it is required by Rev. St. ch. 41, § 13, that the renunciation shall have been filed in the office of the clerk of the county court, and entered at large on the records of the court. Held, that when so filed, and after the clerk has put his file mark on it, and docketed it in the probate docket, it is a part of the records of the court, and cannot be subsequently withdrawn without an order of the court.— COLES v. TERRELL, Ill., 44 N. E. Rep. 391.

119. WITNESS — Impeachment.—A witness cannot be impeached by evidence of contradictory statements collateral to the issue. To enable a party to impeach a witness by evidence of contradictory statements, a foundation must be laid by first calling the attention of the witness to such statements.—MULLEN v. MCKIN, Colo., 45 Pac. Rep. 416.